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IN THE MATTER OF: )

) Docket No.

DETERMINATION OF CABLE ) 14-CRB-0010-CD

ROYALTY FUNDS ) (2010-2013)

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9 BEFORE: THE HONORABLE SUZANNE BARNETT

10 THE HONORABLE JESSE M. FEDER

11 THE HONORABLE DAVID R. STRICKLER

12

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24

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## 1 P R O C E E D I N G S

2 (9:06 a.m.)

3 JUDGE BARNETT: Good morning. Please  
4 be seated.5 We brought over a book truck for these  
6 binders. It narrows that passageway even  
7 further. But it appears we are not -- we don't  
8 have a witness.

9 Mr. Cantor?

10 MR. CANTOR: Yes, we do. Mr. Hartman  
11 is in the back of the room.12 JUDGE BARNETT: Oh, there he is,  
13 hiding. Okay.

14 MR. CANTOR: Shall he take the stand?

15 JUDGE BARNETT: Mr. Garrett looked  
16 like he might have something, some preliminary?17 MR. GARRETT: No, Your Honor, but I  
18 can make one up if you would like.

19 (Laughter.)

20 JUDGE BARNETT: Let's just go ahead  
21 with Mr. Hartman.

22 (Laughter.)

23 MR. GARRETT: I'll catch you later,  
24 Your Honor.

25

1 JUDGE BARNETT: Off the record.

2 (Discussion off the record.)

3 Whereupon--

4 DANIEL HARTMAN,  
5 a witness, called for examination, having previously  
6 been duly sworn, was examined and testified further as  
7 follows:

8 JUDGE BARNETT: Mr. Hartman, you  
9 remain under oath.

10 THE WITNESS: Yes. Okay.

11 JUDGE BARNETT: Mr. Cantor?

12 MR. CANTOR: Good morning, Your  
13 Honors.

14 DIRECT EXAMINATION -- RESUMED

15 BY MR. CANTOR:

16 Q. Mr. Hartman, when we were breaking for  
17 the day yesterday, you were just finishing  
18 summarizing for us why DirectTV carried WGNA  
19 during the period of 2010 to 2013.

20 Just for -- to kind of reset the  
21 context, would you please just briefly  
22 summarize these reasons for us now.

23 A. Oh, sure. So I think I walked through  
24 the fact that we -- you know, in our decision  
25 to launch it and continue carrying it, we -- we

1 put a high value on the live team sports. So  
2 it had 100 games, which is comparable to what  
3 you might find on a regional sports network,  
4 and served a national audience. You know, we  
5 just didn't find as much value on clearly  
6 something like infomercials, which took a big  
7 part of the day, overnights or the, you know,  
8 the more syndicated movie-type content, the  
9 kind of stuff you find other places.

10 Q. Have you reviewed the written  
11 testimony of Mr. Mansell, one of the Program  
12 Suppliers' witnesses?

13 A. Yes, I have.

14 Q. Mr. Mansell asserts that during this  
15 period, 2010 to 2013, that there was a  
16 proliferation of regional sports networks, and  
17 he asserts that this proliferation devalued or  
18 reduced the volume of the team sports on  
19 distantly transmitted signals.

20 Do you have an opinion about  
21 Mr. Mansell's statement?

22 A. Yeah, I do. I think there are -- I  
23 have a couple of opinions. One, I think he's  
24 right when he talks about, you know, the high  
25 value of sports. We talked about it a little

1 bit yesterday. And the fact that, you know,  
2 these sports costs really are going through the  
3 roof and, you know, doubling what non-sports  
4 costs are.

5 So I think it -- it's true that there  
6 are -- you know, these sports costs are  
7 increasing, but I think that it just goes to  
8 show you that people are paying these rights  
9 fees because sports are so important.

10 But I also think that it shows when he  
11 does talk about the -- you know, the fact that  
12 these new RSNs are popping up over the last 15  
13 or 20 years, and that's also true, that, again,  
14 I think it just goes to show you the power of  
15 live team sports.

16 I think that there's no other content  
17 I'm aware of, you know, in all my years at  
18 DirecTV, that you could take and form a new  
19 network and get carriage, get, you know, good  
20 distribution, if not full distribution, at a  
21 high license fee, other than just live sports.

22 I think, you know, operators weren't  
23 thrilled when these new networks, these RSNs  
24 came along, but we knew we had to have them.

25 Q. Do you know how the amount of team

1 sports on WGNA in the period -- in the period  
2 2004 to 2005 as compared to 2010 to 2013, how  
3 the volume of sports compared between those  
4 periods?

5 A. It didn't decline.

6 Q. And if I can, let's put up on the  
7 screen Table Roman numeral III-1 from your  
8 written rebuttal testimony, please. Would you  
9 please tell us what this is?

10 A. Sure. This is a table that sets forth  
11 the -- basically the JSC telecasts that  
12 appeared on WGNA for those two periods that you  
13 just referenced. So if you look at the table,  
14 it walks you through the number of Cubs games,  
15 White Sox games, and Bulls games for 2004 and  
16 2005, and you can see the totals at the bottom  
17 there.

18 And then you jump to 2010 through  
19 2013, again, you can see the totals at the  
20 bottom, and there's no -- there's no decrease.  
21 In fact, there's probably a slight increase in  
22 number of games.

23 Q. And is this the table that you offered  
24 a correction on at the beginning of your  
25 testimony yesterday?

1           A.     Yes. This is the table where the  
2     White Sox -- the number of White Sox games in  
3     2010 should read 32, so that total in 2010  
4     should read 117 -- 116, excuse me.

5           Q.     And does that correction at all change  
6     your opinion?

7           A.     No, no.

8           Q.     And we're going to put on the screen  
9     now Table Roman numeral III-2 from your written  
10    rebuttal testimony.

11                    Would you please tell us what this is?

12          A.     Sure. So this is a similar table. It  
13    shows the Major League Baseball telecasts on  
14    Fox for those two periods that we were talking  
15    about. So it just -- if you go down the left  
16    side there, it just details the type of game,  
17    regular season, all star, league division,  
18    league championship, world series, and then  
19    totals at the bottom, the total number of  
20    telecasts. So, again, for 2004 and 2005, you  
21    can see the totals there at the bottom.

22                    Jump to 2010 through 2013, and, again,  
23    you can see the totals, and there's really --  
24    really no difference, maybe a game or two, but  
25    nothing at all that I would deem material.



1           Q.     And now we're going to put on Table  
2     Roman numeral III-3 from your rebuttal  
3     testimony. And would you likewise explain to  
4     us what this chart shows.

5           A.     Sure. So this is a similar telecast,  
6     which just lays out the NFL telecasts that  
7     appeared on the Fox network for those two  
8     periods. And, again, on the left side -- on  
9     the left side, you can see it's preseason  
10    games, regular season, playoffs, Superbowl, and  
11    Pro Bowl. So it lists the type of games. And  
12    then for the totals 2004-2005 there at the  
13    bottom, you can see the numbers.

14                   And again if you jump to 2010 through  
15    2013, it's virtually identical. So, again, no  
16    decline there.

17          Q.     In Mr. Mansell's written testimony,  
18    did he address changes in the media programming  
19    landscape outside of team sports programming?

20          A.     No, he didn't. I think that if he  
21    had, I think he would have -- if you would have  
22    looked at -- because I know he brings up the  
23    fact that all these new technologies have  
24    created these new opportunities, and I think  
25    that's also correct in his testimony, but I

1 think what that has led to as well is the  
2 proliferation of the more non-sports type  
3 content, sitcoms and movies, just going to more  
4 sources. So not only is it, you know,  
5 increasing across the number of networks it's  
6 on but then there's all these new platforms  
7 like Netflix and Hulu and Amazon and YouTube  
8 that you'll find this content as well.

9 Q. Thank you. Let's turn back to the  
10 Bortz survey for a minute.

11 Did you reach any opinion about the  
12 results of the Bortz survey?

13 A. Yeah, I guess based on my experience,  
14 his findings were consistent with how I think a  
15 multi-channel executive would basically value  
16 the categories of programming.

17 Q. So we yesterday were talking a bit  
18 about the written testimony of Program  
19 Suppliers witness Ms. Sue Ann Hamilton.

20 A. Um-hum.

21 Q. Ms. Sue Ann Hamilton suggests that the  
22 program categories adopted for this proceeding  
23 and that were used in the Bortz survey would be  
24 -- would be, I think her words were, confusing  
25 to distributors.

1 Do you agree with her on that?

2 A. No, because I think that they're -- it  
3 seems pretty -- they seem pretty self-evident  
4 and clear to me. I think that if you look at,  
5 you know, live professional college team  
6 sports, I think that's fairly -- I think if you  
7 asked a -- an executive in our business, what  
8 that meant they would say that it really speaks  
9 to the major -- the marquee leagues, NFL, MLB,  
10 et cetera, and kind of the premier or marquee  
11 college team sports like basketball and  
12 football.

13 Q. Did you also review the testimony of  
14 Program Supplier witness Dr. Joel Steckel?

15 A. Yes, I did.

16 Q. Dr. Steckel asserts, among other  
17 things, that the task of asking distributors to  
18 value different types of programming would be  
19 what he calls unfamiliar.

20 And he says that's so because  
21 distributors typically purchase whole channels  
22 of programming, rather than, you know,  
23 individual pieces of programming.

24 Do you have a view about his  
25 assertion?

1           A.     Yeah. I mean, it's true that we do  
2           mostly negotiate for linear channels, but I  
3           think when you look at the types of linear  
4           channels that we negotiate for, they really do  
5           fall into categories such as news or movies or  
6           sports.

7                     So I think that just, you know, kind  
8           of by default, we negotiate for different types  
9           of programming, even though it may be a channel  
10          of programming, but I think that it's --  
11          basically, it's our day-to-day job to kind of  
12          know those, that type of programming.

13          Q.     Thank you, Mr. Hartman. I have no  
14          further questions.

15                               CROSS-EXAMINATION

16          BY MS. PLOVNICK:

17          Q.     Good morning, Mr. Hartman.

18          A.     Good morning.

19          Q.     I'm Lucy Plovnick. I represent  
20          Program Suppliers. How are you?

21          A.     Good, thank you.

22          Q.     All right. So, Mr. Hartman, I want to  
23          start with your direct testimony, which was  
24          Exhibit 10-10, or 1010. And if you flip to  
25          Appendix A, which is your resume at the back.

1 A. Oh, okay.

2 Q. So just to confirm, you worked at  
3 DirecTV from 1998 to 2013; is that correct?

4 A. That's correct.

5 Q. And before that, you worked at Fox  
6 Broadcasting and Fox Sports?

7 A. That's correct.

8 Q. But you have never been a cable  
9 operator; is that correct?

10 A. I have never been a cable operator,  
11 but I've worked in the MVPD industry.

12 Q. In the MVPD industry. And you would  
13 define that as cable and satellite industry  
14 combined, when you define -- or just define  
15 MVPD.

16 A. Well, I think it is the more  
17 traditional technologies of satellite and  
18 cable.

19 Q. Right. But just to be --

20 A. Just that these bubbles are the same.

21 Q. Just to be clear, though, you have  
22 never worked in the cable side of this  
23 industry; your experience is in the satellite  
24 side of this industry?

25 A. I have never worked for a cable

1 company.

2 Q. All right. Now, you mentioned some  
3 boards that you worked on at the bottom and you  
4 mentioned The Tennis Channel?

5 A. Um-hum.

6 Q. And you also mentioned the Southern  
7 California Committee for the Olympic Games.

8 A. Um-hum.

9 Q. Do you consider tennis and the  
10 Olympics to be sports?

11 A. Do I consider them to be -- sports as  
12 a very general category?

13 Q. Well --

14 A. I mean, if you're talking about a  
15 broad category of sports, yes, there's --

16 Q. Is it sports or is it not sports?

17 A. -- there's 50 different sports, so --

18 Q. Is it sports or not sports?

19 A. It's not live team sports, but it's --

20 Q. But it's --

21 A. -- tennis is a sport.

22 Q. Tennis is a sport, but you wouldn't  
23 consider it live team sports?

24 A. That's correct.

25 Q. All right. Would you consider the

1 Olympics live team sports?

2 A. No.

3 Q. All right. Now, let's move to  
4 paragraph 3 of your direct testimony. And  
5 that's on page 1.

6 A. Okay.

7 Q. So about two-thirds of the way down,  
8 you're talking about your experience at  
9 DirecTV, and you say that you were "responsible  
10 for DirecTV's program acquisition activities  
11 with respect to all general entertainment and  
12 premium cable networks, as well as initiatives  
13 such as video-on-demand programming and the  
14 development of DirecTV's TV Everywhere  
15 platform."

16 Is that correct?

17 A. Yes.

18 Q. So did you also -- were you also  
19 responsible for programming selections with  
20 regard to distant signals while at DirecTV?

21 A. Yes, so that, when I was senior vice  
22 president during that period of 2007 through  
23 2013, the group that I -- there was an entire  
24 group of -- of folks that negotiated our local  
25 station and distant carriage. And they all

1 reported in to me.

2 Q. They reported to you?

3 A. Yes.

4 Q. And were you involved in those  
5 decisions?

6 A. I was -- yes, for the -- yes, I was  
7 involved in -- in the bigger local station  
8 deals, and I was definitely involved in the  
9 distant signal carriage deals.

10 Q. Involved as in you participated or you  
11 just approved what the team under you --

12 A. Both. I mean, if it was a -- there  
13 wasn't a lot of distant signal carriage, other  
14 than WGNA, and unless you're talking about the  
15 big four broadcast networks, so by the time I  
16 came in and took over the group, there wasn't  
17 really, to my knowledge, a lot of new distant  
18 networks being launched.

19 Q. So did that analysis that you would do  
20 in deciding to carry -- well, really everything  
21 you did but also, in particular, distant  
22 broadcast stations, did that include an  
23 analysis or review of Nielsen viewing  
24 information?

25 A. No, it didn't.



1 Q. Nielsen ratings information?

2 A. No. I mean, again, there -- there --  
3 the -- well, when I was -- when the group was  
4 reporting in to me, there was, again, very few  
5 -- if you look at the statement of accounts  
6 that DirecTV filed with the Copyright Office,  
7 you have WGNA, which is this huge chunk, and  
8 then you have the big four broadcast networks,  
9 affiliates of the big four broadcast networks,  
10 for instance, maybe New York and L.A. stations,  
11 which is another decent size chunk, and kind of  
12 independent distants are -- were just a very  
13 small part of that.

14 So I don't -- but to answer your  
15 question, no, I don't recall that we ever  
16 looked at, you know, ratings would have made a  
17 difference. It was really about getting big  
18 four broadcast networks into a market.

19 Q. So -- and you mentioned statements of  
20 account. Did you prepare the statements of  
21 account for DirecTV?

22 A. I did not. We had an accounting group  
23 that would have prepared those.

24 Q. Did you review them as a part of your  
25 work at DirecTV?

1 A. Yes.

2 Q. So you would review them before they  
3 went out or just in the course of -- you said  
4 the Accounting Department.

5 A. The Accounting Department would bring  
6 to me and we would just run through them and I  
7 would sign them.

8 Q. You would sign them, but you would  
9 review them first or you would just accept that  
10 --

11 A. They would basically do a quick  
12 walk-through with me, but I did not review them  
13 station by station or, you know, subscriber  
14 detail or anything like that.

15 Q. Right.

16 A. They had all the records so I trusted  
17 them.

18 Q. So, Mr. Hartman, when you were working  
19 at DirecTV, did you work with a person named  
20 Toby Berlin?

21 A. Yes, I did.

22 Q. Ms. Berlin also worked at DirecTV from  
23 1998 to 2013; is that correct?

24 A. She did. And she reported to me for  
25 several of those years in the end.

1 Q. Ms. Berlin was a vice president of  
2 programming acquisitions?

3 A. Correct.

4 Q. Was she a part of the team that you  
5 were describing that worked under your  
6 direction?

7 A. She was part of the team -- the local  
8 channel team or --

9 Q. Well, you tell me.

10 A. Yeah. Okay. So she was involved in  
11 local channel launches, I think back in the  
12 early days, you know, around the early 2000s, I  
13 think, and then segued into different areas.  
14 So when she was reporting to me, she was  
15 working on -- she would negotiate our adult  
16 programming deals. She negotiated our airborne  
17 deals, she negotiated our Pay Per View  
18 contracts, boxing and wrestling. She worked on  
19 ethnic platform. I think that was about it.

20 Q. And she also was involved with distant  
21 signals as well, was she not?

22 A. Not when she was reporting to me, no.

23 Q. Not when she was reporting to you?

24 A. No. That all came through the  
25 station -- the local station group, which

1 reported in to me, she was not a part of.

2 Q. But she -- so are you aware that she  
3 has testified here in proceedings --

4 A. Yes.

5 Q. -- before the Copyright Royalty  
6 Judges?

7 A. Yes.

8 Q. Have you reviewed her testimony?

9 A. I have.

10 Q. All right. Let's take a look at her  
11 testimony. So if you --

12 MR. PLOVNICK: Oh, and before we do  
13 that, Your Honor, as a housekeeping matter, I  
14 understand that all the parties have agreed to  
15 stipulate to the admission of MPAA Exhibits  
16 6041 through 6044, inclusive. And I would move  
17 their admission before we actually start  
18 looking at them.

19 JUDGE BARNETT: Hearing no objection,  
20 6041 through 60 -- did you say 44?

21 MS. PLOVNICK: 44, yes, Your Honor.

22 JUDGE BARNETT: Inclusive, are  
23 admitted.

24 (Exhibit Numbers 6041, 6042, 6043,  
25 6044 were marked and received into evidence.)

1 BY MS. PLOVNICK:

2 Q. So take a look at Exhibit 6041, which  
3 is which is the written direct testimony of  
4 Toby Berlin from the 2004 through 2009 cable  
5 and 1999 through 2009 satellite Phase II  
6 proceeding.

7 A. Okay.

8 Q. Do you see that?

9 A. Yes, I see that -- yes, the front page  
10 here, yes.

11 Q. All right. And so if you turn to page  
12 6 of that testimony, and you look under heading  
13 D at the bottom of the page, and you see the  
14 heading that says "importance of program  
15 ratings"?

16 A. Um-hum.

17 Q. So if you just take a look -- and have  
18 you had a chance to review this testimony?

19 A. I -- I did. Yes.

20 Q. So what Ms. Berlin says here, at the  
21 bottom of page 6 and carrying over to page 7,  
22 and I'll just, you know, read it, "In deciding  
23 whether or not to carry that station on an out  
24 of market basis, we would look at ratings, just  
25 like our cable competitors. Our marketing and

1 business analytics departments would supply a  
2 list of stations in a DMA with their Nielsen  
3 ratings. If a station had high ratings, and  
4 cable had it or we believed it would bolster  
5 our line-up because it had high ratings, we  
6 would carry the station out of market and pay  
7 copyright royalties. Ratings were the single  
8 most significant factor that the business team  
9 considered when evaluating new programming  
10 acquisition opportunities. The Nielsen ratings  
11 and other audience measurement tools play a  
12 pivotal role in determining the true value of a  
13 signal and its constituent programs. This is  
14 consistent with the very simple paradigm that  
15 satellite operators value programs that people  
16 watch and do not value programs that people do  
17 not watch. Based on my years of experience in  
18 the subscription television industry, I would  
19 say other satellite service providers and cable  
20 operators all viewed ratings as a principal  
21 measure of value within a defined genre of  
22 programming."

23 So would you agree or disagree with  
24 Ms. Berlin's testimony?

25 A. I would disagree with that.

1 Q. You would disagree?

2 A. Yes. I think that you can look at it  
3 from two different perspectives, as I was  
4 reading through it. And one is just when  
5 you're talking about distant signals -- and I  
6 can speak to the period, you know, from about  
7 2007 or so on when, again, the station group  
8 reported in to me and we did not use ratings  
9 for distant signals. Again, any market that we  
10 were bringing distant signals in, it was  
11 basically trying to get the big four networks,  
12 which is what were most important to the  
13 customers.

14 You know, I can't speak to when she  
15 was -- the early, I guess, 2000s, I wasn't part  
16 of that group then, but, again -- and I read  
17 her example of trying to, I think, bring in  
18 signal from San Diego into L.A. or vice versa,  
19 and, I mean, I guess just speaking from I was  
20 at the company then and I was involved in  
21 obviously the -- just in knowing kind of how  
22 the company worked, I just think that any  
23 distant signals brought in that weren't a big  
24 four affiliate were really around the edges.  
25 And I don't know that ratings would have

1       mattered.

2               But I can speak more generally too. I  
3 would like to speak more generally because I  
4 think she's -- she was not involved -- the  
5 types of programming she worked on for most of  
6 the time she was at DirecTV, most of it didn't  
7 even involve seeing ratings. I mean, Pay Per  
8 View events, she worked on the music channels,  
9 she worked on, again, adult. A lot of the  
10 ethnic programming is Pay Per View packages.

11              So she would not have been -- you  
12 know, I think I can speak much better to the  
13 fact of whether or not we used ratings overall,  
14 you know, in the general platform and  
15 negotiations and decisions, and I can say that  
16 there were -- again, as I said in my testimony  
17 yesterday, they were -- you know, they just  
18 really not determinative. We definitely looked  
19 at them but --

20       Q.     Well, so -- so from reviewing  
21 Ms. Berlin's testimony, it's clear that ratings  
22 were important to her.

23       A.     I can't speak for her. I can only  
24 speak for the fact that, you know, I was the  
25 head -- I ran the programming group and --



1           Q.     So is it fair to say that within a  
2     single organization like DirecTV, that  
3     different individuals have different opinions  
4     about what's important in their  
5     decision-making?

6           A.     Again, I can't speak to her.  Maybe  
7     she does have a different opinion.  I --

8           Q.     Well, she clearly does.

9           A.     She reported in to me for a long  
10    period of the time while I was a senior vice  
11    president there.  And I -- I don't recall her  
12    ever coming to me and bringing ratings and  
13    saying this makes a difference or -- I don't  
14    know how she would have necessarily used these  
15    ratings.  So I --

16          Q.     You don't --

17                 JUDGE FEDER:  Excuse me.

18                 THE WITNESS:  Sure.

19                 JUDGE FEDER:  Mr. Hartman, a moment  
20    ago you said "around the edges."  What do you  
21    mean by that?

22                 THE WITNESS:  Oh, I think it's -- I  
23    mean, I think maybe -- and I was trying to  
24    understand -- like I said, I have to admit I  
25    didn't quite really understand her example.

1 She didn't give certain -- she didn't give a  
2 specific station to say we launched KQED or  
3 something because, you know -- or we brought it  
4 in distantly because it was important.

5 I was -- I was thinking that maybe she  
6 was talking more about maybe devotional or  
7 other types of programming, that, you know, may  
8 have been kind of a one-off. Like maybe it's  
9 worth it to bring in this one distant signal  
10 because maybe it does serve a particular niche.  
11 But I don't think -- again, I think that was  
12 just around the edges. It wasn't like we were  
13 doing that in multiple markets as I understand  
14 it.

15 BY MS. PLOVNICK:

16 Q. All right. So -- but you don't know  
17 what Ms. Berlin considered or didn't consider  
18 in her programming decisions?

19 A. Well, again, I'm trying to think how  
20 she would have used ratings for the types of  
21 work she worked on when she was reporting to  
22 me. It wouldn't have -- it wouldn't have  
23 factored in. And she wouldn't have been in --  
24 she was never in any negotiations for the  
25 general market platform, all the deals I worked

1 on, which is, you know, the vast majority of  
2 the programming. So I'm not sure, you know --  
3 again, I can't speak for her, but I can only  
4 speak for my experience as running the  
5 programming group.

6 Q. Right. You speak from your  
7 experience, but she clearly has a different  
8 view of what's important than you do.

9 A. She -- her testimony says that.

10 Q. All right. If we look in the next  
11 paragraph of her testimony, she says, "One  
12 reason ratings are crucial is because it is  
13 difficult to discontinue a channel after a  
14 commitment has been made to include it. Once a  
15 decision was made to carry a station out of  
16 market, DirecTV rarely, if ever, pulled it from  
17 the DMA, unless that DMA became 'served' or if  
18 that network's station launched in the DMA.  
19 The reason we never pulled a station once  
20 launched is that every station had some local  
21 constituency, usually" --

22 JUDGE STRICKLER: Loyal, loyal  
23 constituency?

24 MS. PLOVNICK: I'm sorry -- loyal  
25 constituency -- you're right, Your Honor.

1 BY MS. PLOVNICK:

2 Q. -- "loyal constituency, usually a  
3 niche audience. However small it might be, we  
4 never wanted to have subscribers retaliate by  
5 'churning' off the platform or discontinuing  
6 service. So it was a common practice of  
7 DirecTV that once a station's carriage  
8 commenced, the signal rarely went dark or was  
9 pulled off the air."

10 Would you agree with that testimony of  
11 Ms. Berlin?

12 A. Well, no. I mean, I don't -- I do --  
13 you know, I think you can look at the history  
14 of DirecTV, and probably cable as well, and  
15 it's not commonplace for cable networks or  
16 stations to be pulled. I mean, it is a last  
17 resort.

18 It's happening more and more with  
19 broadcasts with the station groups, because the  
20 fees they are asking for are so high. You  
21 know, we did drop networks. I think that, you  
22 know, usually when you're coming down to the  
23 wire in a negotiation, last week or two, and  
24 you see the crawls on screen and you see people  
25 messaging about losing channels, it really does

1 bring the parties to the table.

2 But I wouldn't agree -- you know, I  
3 worked on our Viacom deal in 2012 where we  
4 dropped 14 Viacom channels for about two weeks  
5 just because of the deal there. So, you know,  
6 I do -- it's not -- you don't relish pulling  
7 programming, but I think when you have to look  
8 at the decision for pulling programming, you  
9 know, the biggest factor is are you going to  
10 lose customers?

11 And I think that, you know, in my  
12 testimony yesterday, live sports was the most  
13 important -- was the category we were most  
14 worried about if we had to drop.

15 Q. Dropping a channel -- the reason you  
16 would not drop a channel you carry along for a  
17 long period of time was because you were afraid  
18 that you would lose customers?

19 A. Well, no. I think it's just a matter  
20 of degrees. So I think that, yes, every  
21 channel, you could -- yes, every channel has  
22 somebody, it's somebody's favorite. DirecTV  
23 had 20 million customers so you're going to  
24 find somebody that -- but I think that when you  
25 made the decision -- when we discussed

1 decisions to drop -- again, this is just  
2 another point, that ratings never factored into  
3 that decision.

4           The last couple of weeks we were  
5 polling customers, we were kind of trying to  
6 run numbers as to, okay, you know, is this  
7 programming so important that we're going to  
8 lose customers quickly? Do they have other  
9 alternates? So if it's a movie channel, we can  
10 just, you know, tell them to go watch -- you  
11 know, there's other -- five other movie  
12 channels on DirecTV, so you'll find a  
13 substitute with -- again, live sports, that was  
14 our biggest category that we were most worried  
15 about dropping.

16       Q.     But you agree with Ms. Berlin that you  
17 would rarely, if ever, drop a station if you  
18 could help it?

19       A.     Yes, we -- the goal was always to  
20 reach a deal with every programmer.

21       Q.     Would you describe continuing to carry  
22 these signals as legacy carriage?

23       A.     No, because I think every time a deal  
24 came up, you know, whether it be four, five,  
25 six years, there was a review of the value of

1 the network and whether or not it made sense to  
2 keep on the platform.

3 Q. And you usually decided it made sense  
4 to keep the same signals on the platform if you  
5 could?

6 A. Well, I mean, I guess if you're asking  
7 if we dropped a lot of networks, no, we didn't.  
8 But every -- every channel was examined every  
9 time it came up for renewal.

10 So if the value equation wasn't there,  
11 then we would become much tougher in our  
12 negotiation. And then we would usually reach a  
13 deal and it was -- then it would be more  
14 favorable to us.

15 Q. The goal was to reach a deal to  
16 maintain the same carriage because the  
17 subscribers would not be happy if they didn't  
18 continue to get the signals that they cared  
19 about?

20 A. Yes, it's a matter of degrees, like I  
21 said. You know, every channel has somebody,  
22 it's somebody's favorite. So the goal, of  
23 course, was to keep as much programming on the  
24 platform as we could because, yes, that is the  
25 way to keep customers happy.

1 Q. All right. So let's just switch gears  
2 for a little bit.

3 And, Dima, you can take that off.

4 Let's just talk a little bit about  
5 programming decisions in general. So -- and I  
6 think you testified that when a satellite  
7 carrier makes a programming decision, it's  
8 usually about whether to carry a whole station  
9 or a whole cable network. You're not usually  
10 selecting individual programs or categories of  
11 programs. Is that correct?

12 A. Yes. Our negotiations for -- if  
13 you're asking about, yes, the negotiations at  
14 DirectTV are generally for linear channels.

15 Q. And sometimes you would purchase  
16 multiple signals or networks in a package or  
17 bundle; is that correct as well?

18 A. Yes, from the same content owner?

19 Q. Yes.

20 A. Yes.

21 Q. So --

22 JUDGE STRICKLER: Excuse me, counsel.  
23 I don't want to lose the thread, going back.

24 THE WITNESS: Sure.

25 JUDGE STRICKLER: Good morning, sir.



1 THE WITNESS: Good morning.

2 JUDGE STRICKLER: You said that -- in  
3 response to counsel's question a moment ago,  
4 that every station would come up for renewal  
5 over a period of time. And when they would,  
6 you would review the station and you'd either  
7 decide whether or not you wanted to drop it,  
8 whether you wanted to keep it, or maybe be  
9 tougher in negotiations because you thought you  
10 had a better bargaining position.

11 What would make a station weaker such  
12 that you would negotiate for -- you would  
13 negotiate and seek lower -- to pay lower rates?

14 THE WITNESS: I think that if -- if  
15 they had lost certain product. You know, I  
16 could use general entertainment or sports. You  
17 know, if they had a couple of big shows that  
18 had been fan favorites or something, you know,  
19 like a Mad Men or something or Walking Dead,  
20 and they lost that programming, I think that  
21 would make their leverage weaker. If they had  
22 lost a major team, if they were a sports  
23 network, that would clearly factor into our  
24 evaluation.

25 It really came down to whether or

1 not -- again, we did a lot -- we tried to do a  
2 lot of analysis as to how long can we be off  
3 with this network and not suffer the  
4 consequences of losing customers?

5 JUDGE STRICKLER: When you would  
6 decide whether to negotiate to pay a lower rate  
7 or to -- whether to drop the station, did you  
8 look at whether or not people were actually  
9 watching programs on the station?

10 THE WITNESS: I would do an initial  
11 analysis. I think, like I said yesterday, I  
12 would look back over historicals and just to  
13 see -- just as they would come in and tout, you  
14 know, they could slice and dice it any way they  
15 wanted, their prime time on Tuesdays was up  
16 20 percent or something, you know, I could walk  
17 in and say: Well, overall, I think your  
18 ratings are down a little bit here and there.

19 But in the end, you know, I think it  
20 was kind of used as an initial -- you know,  
21 initial tactic in kind of starting negotiations  
22 and, you know, you kind of -- as we're all  
23 gathering 50 pieces of information to go  
24 negotiate with. But when push came to shove,  
25 again, ratings didn't really -- we would look

1 much more at kind of how important that  
2 programming was. And, again, to me it was just  
3 how quickly our customers are going to leave  
4 the platform.

5 JUDGE STRICKLER: In your answer you  
6 mentioned in the beginning of the negotiations  
7 you would talk to the station representatives  
8 about, well, your prime times, is the  
9 expression I think you used --

10 THE WITNESS: Yeah.

11 JUDGE STRICKLER: -- your prime times  
12 are up or prime times are down. By "prime  
13 times," were you referring to your ratings in  
14 prime time?

15 THE WITNESS: Oh, they -- so they  
16 would come in and say -- you know, use AMC for  
17 instance, they would come in and say, well --  
18 they would ignore, obviously, ratings that  
19 didn't favor them, but they might come in and  
20 say: Well, look, this program has -- it just  
21 launched and it's now seeing, you know, 10 or  
22 20 percent increases every year. Or --

23 JUDGE STRICKLER: So they would try to  
24 push that the station was valuable and the  
25 programming was valuable because the ratings

1     were high. And you, in the negotiations, at  
2     times would push back and say: Well, maybe  
3     that's not really so. And then you'd point to  
4     the negative ratings that they were trying to  
5     obscure or not emphasize?

6             THE WITNESS: Yeah, I mean, I think  
7     that -- again, I think both parties looked at  
8     it like -- you know, again, it's much more  
9     important to the network because that's where  
10    they make a lot of their money, is advertising  
11    sales.

12            I think we both -- like I said, it  
13    would be, you know, one of 25 things you would  
14    use in your arsenal. But, again, when push  
15    came to shove, the last X number of weeks or so  
16    and these negotiations got very intense, always  
17    went down to the 11th hour, it really came down  
18    to, you know, the value equation. And we would  
19    look at what -- you know, again, what would it  
20    cost us in losing subscribers to lose this  
21    content and whether we were at a rate that  
22    could justify paying them.

23            JUDGE STRICKLER: Can we put  
24    Ms. Berlin's testimony back up on the screen  
25    for a moment if possible.

1 MS. PLOVNICK: Sure. And, Dima, if  
2 you could please put it up.

3 JUDGE STRICKLER: The part that you  
4 were -- yeah, that's it. Thank you. I don't  
5 know what paragraph we were in or page number  
6 we were on there.

7 MS. PLOVNICK: For the record, this is  
8 page 7 of Exhibit 6041.

9 JUDGE STRICKLER: I think that's the  
10 wrong one. Stop scrolling. You're making me  
11 motion sick.

12 (Laughter.)

13 JUDGE STRICKLER: Thank you.

14 In her testimony, she says at the end  
15 of a paragraph, I can't tell which one it is,  
16 on page 7 I think, she says -- that is  
17 Ms. Berlin, right? -- "Based on my years of  
18 experience in the subscription television  
19 industry, I would say other satellite service  
20 providers and cable operators all viewed  
21 ratings as principal measure of value within a  
22 defined genre of programming."

23 I want to focus on that last phrase  
24 there, "within a defined genre of programming."  
25 Did you understand that once you had identified

1 a particular genre of programming that you  
2 thought would round out the package of  
3 programming in stations that you had, that you  
4 would then be more -- at that point be more  
5 interested than you were previously as to  
6 ratings because once you know the genre you  
7 want, you want a more popular version, a more  
8 popular program within that genre?

9 THE WITNESS: Yeah, I'm trying to --  
10 so I think that, you know, maybe she's again  
11 getting back to the early days of before we had  
12 launched most -- you know, the local markets  
13 and whether -- again, whether she was looking  
14 at bringing in distant signals for maybe even  
15 ethnic variety or devotional programming,  
16 religious programming.

17 And all things being equal, okay,  
18 there are two networks we can bring in, we only  
19 have room for one, which one do we think is,  
20 you know, you know -- you know, again, I can't  
21 speak to kind of what -- the work she did back  
22 in the early 2000s. You know, I'll say now  
23 that there's not a lot of new channel launches,  
24 other than regional sports networks. I think  
25 you could look at the DirecTV platform over the

1 last ten years and maybe there has been a  
2 handful of non-sports networks launched. So  
3 there's not a lot of -- you know, I think now  
4 as, you know, the saturation of the market  
5 happens not only with -- it has not only  
6 happened with customers but with programming, I  
7 think people basically are carrying everything  
8 that's out there now.

9 JUDGE STRICKLER: She reported  
10 directly to you over some period of time?

11 THE WITNESS: Yes, she did.

12 JUDGE STRICKLER: How many years?

13 THE WITNESS: Probably about five or  
14 six years.

15 JUDGE STRICKLER: She was never  
16 terminated by you or demoted by you?

17 THE WITNESS: No, no.

18 JUDGE STRICKLER: Never chastised for  
19 being dishonest in any way by you?

20 THE WITNESS: No, not by me. No.

21 (Confidential session.)

22 //

23 (Return to open session.)

24 JUDGE STRICKLER: Thank you.

25 BY MS. PLOVNICK:

1 Q. Okay. You and Ms. Berlin both left  
2 DirecTV in 2013; is that correct?

3 A. That's correct.

4 Q. Did you both leave for the same  
5 reason?

6 A. No, I was burned out on the industry  
7 so I took about a year and a half off and  
8 traveled. I actually don't know the  
9 circumstances behind hers. She left after I  
10 did so I don't know the circumstances behind  
11 her.

12 Q. She left after you did?

13 A. Yes.

14 Q. But in the same year?

15 A. Yes, I think that's right.

16 Q. So you both were at DirecTV from 1998  
17 to 2013, the exact same years?

18 A. Yeah, I guess that's right.

19 Q. Okay. So let's talk a little bit  
20 about the Bortz survey. I understand you  
21 reviewed the Bortz survey for 2010 to 2013 --

22 A. Yes, I did.

23 Q. -- for your testimony in this  
24 proceeding? Have you ever participated in a  
25 Bortz survey during your time as a satellite



1 carrier?

2 A. In a Bortz survey, no.

3 Q. And do you know if Bortz surveys  
4 satellite carriers?

5 A. I don't know that.

6 Q. All right. But you have never  
7 participated -- because you're not a cable  
8 operator, you've never participated in the  
9 cable operator Bortz survey?

10 A. I have never participated in a Bortz  
11 survey.

12 JUDGE STRICKLER: Have you  
13 participated in any similar survey?

14 THE WITNESS: I would participate in  
15 surveys that were -- not -- I wouldn't say  
16 directly related to this survey or very similar  
17 to this survey. I would participate in  
18 surveys. A lot of time content companies would  
19 kind of call around and survey all the  
20 distributors anonymously, like a Disney or  
21 Viacom, and ask about value of content and what  
22 went into decision-making and other things, but  
23 I did not participate in particular in a survey  
24 that was very similar to this one, no.

25 JUDGE STRICKLER: Thank you.

1 BY MS. PLOVNICK:

2 Q. All right. So let's turn to page 5 of  
3 your direct testimony, which is Exhibit 1010.  
4 And at the bottom of that page, you report the  
5 point estimates from the Bortz report; is that  
6 correct?

7 A. That's correct.

8 Q. And those are literally copied and  
9 pasted from the Bortz report?

10 A. Yes, that's correct.

11 Q. So now, is it your testimony that  
12 these results reflect the market value of the  
13 different categories of programs from -- that  
14 were retransmitted on distant signals between  
15 2010 and 2013?

16 A. Yes, I think they're consistent with  
17 -- with how I would value them.

18 Q. You say they're consistent with how  
19 you would value them. Is that market --

20 A. I mean, I could -- yes, they're  
21 consistent. When I saw these numbers, I said,  
22 you know, that just makes sense to me. It  
23 seems consistent with how operator -- you know,  
24 a MVPD executive would value these categories.

25 Q. So do you think that reflects the

1 market value of the programming categories or  
2 your willingness to pay?

3 A. Well, no, I think it's the market --  
4 you know, I think the question was relative  
5 value. And so I think that's --

6 Q. Is relative value the same as market  
7 value?

8 A. Relative value -- when I read the  
9 questionnaire, I read it as when you're looking  
10 at these categories of programming and you're  
11 talking about distant signals, how -- you know,  
12 what's the relative value of each category  
13 versus the other category?

14 Q. And would you believe that to be  
15 relative value within the market that existed  
16 in 2010 through 2013?

17 A. Yeah, yes.

18 Q. So -- and that would be the regulated  
19 market subject to the statutory licenses?

20 A. Well, I think that -- you're asking --  
21 wait, I'm sorry, what are you asking?

22 Q. I'm saying so in -- you're talking  
23 here -- you say this is a relative valuation  
24 for 2010 through 2013.

25 A. Um-hum.

1 Q. And I said would that be the market  
2 that existed that cable operators were in when  
3 they made these valuations in 2010 through  
4 2013? I believe you said yes.

5 And so I was saying -- asking you to  
6 confirm that the market that existed between  
7 2010 and 2013 was a regulated market, subject  
8 to statutory licensing.

9 A. Well, but I do believe one of the  
10 questions asked, you know, if you had to go out  
11 and purchase this in the marketplace, what --  
12 you know, what are the values you would give.

13 Q. Oh. Well, why don't we take a look.

14 A. Okay.

15 Q. Let's look at the Bortz report, which  
16 is Exhibit 1001.

17 A. I mean, they're asking about the  
18 specific distant networks that were listed in  
19 the questionnaire.

20 Q. Correct. And if you flip to the back,  
21 there's a bunch of questionnaires, actually, in  
22 the back of the Bortz report. But we can just  
23 pick one. Let's see.

24 I'm looking at -- I'm going to just  
25 look at Question 4a in one of those

1 questionnaires. So let me find one to point  
2 you to. I'm looking at -- well, I think the  
3 one they put up on the screen is C-14. We can  
4 use the one that's on the screen just to make  
5 it fast and easy for everybody here.

6           Actually, this is a WGNA-only one, so  
7 we want one that's not WGNA-only, in case the  
8 language is different, because most of the --  
9 would you agree that there are more WGNA  
10 systems that are not just WGNA-only than  
11 WGNA-only systems?

12       A.     I'm sorry, WGNA carrying --

13       Q.     Carrying WGNA as one of multiple  
14 signals, rather than being a WGNA-only system.  
15 Would you agree that there are more cable  
16 systems that carry multiple signals, rather  
17 than just WGNA-only?

18       A.     Oh, I didn't look at all the --

19       Q.     You didn't --

20       A.     -- statement of accounts for cable --

21       Q.     Okay.

22       A.     -- so I can't speak to that.

23       Q.     Okay. Well, let's just -- how about  
24 -- let's look at B-20.

25       A.     Okay.

1           Q.     That's the one that's on here. So  
2     this is Question 4a from the Bortz survey.

3           MR. CANTOR: Excuse me. Could you  
4     just make available for him the full version of  
5     the survey that you're talking about?

6           MS. PLOVNICK: Sure. I've got it  
7     right here, actually, if I may approach the  
8     witness. I think it's probably also in one of  
9     the mini-binders over there. May I approach?

10          JUDGE BARNETT: You may.

11     BY MS. PLOVNICK:

12          Q.     All right. This is a copy of  
13     Exhibit 1001, in case you would like to look at  
14     any other page of it. But I'm really simply  
15     looking at Question 4a, so that you can  
16     understand what the language was because I  
17     think that you were trying to remember it off  
18     the top of your head.

19                 So in Question 4a, it says, "Now, I  
20     would like you to estimate the relative value  
21     to your cable system of each category of  
22     programming actually broadcast by the stations  
23     I mentioned during" -- and they say the year --  
24     "excluding any national network programming  
25     from ABC, CBS, and NBC."

1           A.     I'm sorry, let me -- okay, I'll look  
2     here. I'm in the WGNA one.

3           Q.     I think we're on page B-20. That's in  
4     the back in the appendices.

5           A.     Okay.

6           Q.     It says "relative value to your cable  
7     system of each category of programming actually  
8     broadcast by the stations I mentioned during"  
9     -- and this one it says 2013 -- "excluding any  
10    national network programming from ABC, CBS, and  
11    NBC."

12          A.     Um-hum.

13          Q.     So my question is, is this the --  
14    asking for a relative valuation based on the  
15    market as it existed in 2010 through 2013,  
16    which would be the regulated market?

17          A.     Well, I think that, yeah, I mean, it's  
18    asking you to value the programming on --  
19    again, on the stations they were carried, the  
20    distant signals, correct? But I think that --

21          Q.     The distant signals that were carried?

22          A.     Yes. But I think that -- and so I  
23    think you're talking about specifically with  
24    respect to the program that's on these distant  
25    signals, but I think your -- you know, my

1 experience in negotiating for types of content  
2 would help me evaluate the types of content  
3 that were on these distant signals.

4 Q. So you're saying that you wouldn't be  
5 limiting it to distant signals, if you were to  
6 be asked this question?

7 A. Well, no. I would look at what  
8 programming was on the distant signal and I  
9 would say, you know, clearly that if I was  
10 bringing the distant signal in, I'm assuming it  
11 was because of a certain type of programming on  
12 that signal that I was looking for something --  
13 there's a reason I'm bringing that distant  
14 signal in.

15 And so I would -- you know, so I would  
16 look at whatever the signals were and -- you  
17 know, and figure out, okay, well, how important  
18 was that type of programming for me to bring in  
19 on this distant signal.

20 Q. So you would limit it to the signals;  
21 you wouldn't be considering other kinds of  
22 programming?

23 A. Well, I think you would look, I  
24 guess -- you know, I would look at what the  
25 content that was on the distant signal. Again,



1 I'm bringing it in for a reason, so -- and  
2 then --

3 Q. And is it your testimony you would  
4 consider other factors outside of distant  
5 signals? Or that you would limit your  
6 consideration to the value of the programming  
7 on the distant signals?

8 A. Well, I'm looking at the distant  
9 signals. So I'm evaluating the content that's  
10 on the distant signals.

11 Q. So you would evaluate the content on  
12 the distant signals and you would limit your  
13 consideration to the value of the content on  
14 the distant signals?

15 A. Yes, that's correct, although, like I  
16 said, at some point, you know, you do know the  
17 value of content because of all the -- you  
18 know, you're a professional in the industry.

19 Q. And you would be -- you would, just to  
20 bring it -- just to clarify what you were  
21 saying, so you would be focused on the content  
22 on the distant signals that you were carrying  
23 subject to the statutory license in the  
24 relevant royalty years as considering Question  
25 4a?

1           A.     The survey to me was asking what --  
2     I'm reading -- I'm looking at the distant  
3     signals that I carry. And what is the -- you  
4     know, obviously like I said, if I have a fixed  
5     dollar amount to spend, a budget to spend, to  
6     acquire the non-network programming on those,  
7     you know, on that -- on the programming that's  
8     on these distant signals -- this, I think, asks  
9     for a percentage, right, the percentage of the  
10    fixed dollar amount -- so I've got a fixed  
11    dollar amount. How much am I going to allocate  
12    to sports?

13                So I would look at the stations that  
14    I've carried and say, okay, well, you know,  
15    given these, I think that, you know, X percent  
16    is a fair value. That's what I would value,  
17    the relative value of sports versus the other  
18    content that would be appearing on these  
19    distant signals.

20                JUDGE STRICKLER: When you would make  
21    that analysis as you're going through that in  
22    your answer, would you consider how much in the  
23    way of sports you already have in your line-up  
24    on other channels and say, for example -- I'm  
25    not saying this is the case, but

1     hypothetically -- well, we've already -- we  
2     think we've exhausted the sports enthusiast who  
3     is going to subscribe, so sports, while it may  
4     be the biggest overall driver of what we have,  
5     we've so successfully tapped into that market  
6     that we don't need to tap -- you know, getting  
7     the Cubs, the White Sox, and the Bulls, three  
8     out-of-market teams on a distantly  
9     retransmitted station is not that big a deal.

10           So sports on the margin now, now that  
11     we're -- that you're looking at a distantly  
12     retransmitted station, isn't as big a driver as  
13     it otherwise would be when you're first  
14     creating your overall line-up of stations and  
15     networks?

16           THE WITNESS: I guess, you know, I  
17     think that -- I guess if you use WGNA as an  
18     example, we saw -- you know, DirecTV clearly  
19     saw value in live team sports programming,  
20     locally, nationally. You know, ESPN is a  
21     national sports network.

22           I don't think -- you know, it's --  
23     satellite and cable do work differently as far  
24     as how they can import distant signals. And so  
25     as I understand it, cable can bring in distant

1 signals without permission into a launched  
2 market where satellite can't.

3 And so I think they may have made a  
4 determination for bringing, say, a Fox station  
5 in that I can get a regional game that's not  
6 available in my local Fox or something. So,  
7 you know, if you're bringing in a distant  
8 station from a neighboring market and it has  
9 got the same sports, maybe the value isn't  
10 there, because you're seeing the exact same  
11 programming, I will say for something like WGN,  
12 we really did see -- you know, we launched the  
13 WGNA before we launched the Tribune stations.  
14 We saw value. We kept that because we saw the  
15 value.

16 JUDGE STRICKLER: If you were  
17 answering this survey, would you -- given how  
18 important sports is in terms of subscribership,  
19 would you give 100 percent to sports and zero  
20 to the other categories?

21 THE WITNESS: No, because I think that  
22 you -- you know, I think, again, when you're  
23 looking at the -- and, again, satellite does  
24 work differently, but I imagine as a cable  
25 operator if you're looking at the six different

1 stations you're carrying or whatever, you're --  
2 again, you're bringing those distantly in for a  
3 reason. So there's a type of programming on  
4 there or whether it's, you know, a newscast or  
5 some other type of local programming or sports  
6 or something else that you find valuable.

7 But --

8 JUDGE STRICKLER: So there does come,  
9 if you will, a saturation point even with  
10 regard to the distantly retransmitted stations,  
11 where you say enough with the sports already,  
12 we can do better by having some other  
13 programming type. Sports may be 50, 60,  
14 70 percent, whatever number you might choose as  
15 the percent in this constant sum survey, but at  
16 some point you're going to say that's enough,  
17 let's move into some other niche or programming  
18 category that will better serve our bottom  
19 line?

20 THE WITNESS: I mean, I think you  
21 could say that probably with the general market  
22 and I assume distant signals as well, that you  
23 want to serve as many customers, as many bases,  
24 your whole customer base. And that would  
25 include trying to provide as much content as

1       you can from all genres.

2               JUDGE STRICKLER: Which goes back to  
3       my first question. So if you already had a  
4       channel and station network line-up before you  
5       started looking at the distantly retransmitted  
6       stations, you would on the margin add sports or  
7       not add sports in part based on how much you  
8       had in the way of sports already; isn't that a  
9       fair statement?

10              THE WITNESS: I guess if you're  
11       looking at -- I guess I separate out  
12       super-stations and local -- and distant, you  
13       know, distant stations and bringing in a  
14       neighboring signal from another market.

15              And like I said, I guess -- you know,  
16       if your question is would I see value in  
17       bringing in a distant Fox if I've already got  
18       the Fox and it has got all the same programming  
19       on it, you know, I'm not getting a different  
20       game of sports, yeah, maybe I don't know that I  
21       would see the value there, but I think -- I'm  
22       sorry if I'm not --

23              JUDGE STRICKLER: No, you're  
24       answering.

25              THE WITNESS: Okay.

1 JUDGE STRICKLER: But what if it's --  
2 what if it's a different team? I mean, in the  
3 local market, if it was the New York market,  
4 say you already had the Knicks and the Nets, so  
5 you had basketball and you had other basketball  
6 on the super-stations.

7 THE WITNESS: Um-hum.

8 JUDGE STRICKLER: Would that -- would  
9 you consider whether or not there would be  
10 sufficient value added by importing a station  
11 because it had the Chicago Bulls?

12 THE WITNESS: Yes, I would --

13 JUDGE STRICKLER: When that market  
14 already had a lot of basketball?

15 THE WITNESS: Oh, no, because I don't  
16 think -- no, I actually -- I think I understand  
17 your question now. I think that I guess, you  
18 know, when you talk about -- you know, I know  
19 at some point you talk about the passion of the  
20 fans.

21 I think you've got, you know, a large  
22 base of sports fans that are pretty passionate.  
23 And they'll watch, you know, sports when it's  
24 on. That's why ESPN has Sports Center. And  
25 then you clearly have your local teams that are

1 -- that serve a local audience.

2 But there are a number of teams that I  
3 would be interested in bringing nationally, if  
4 I could, that just the rights don't allow you  
5 to do that. The Cubs, you know, WGNA, because  
6 of the super-station, we were allowed to serve  
7 an entire national audience and that was  
8 important to us. I'm not saying everybody is a  
9 Cubs fan, but for the rate they were paying --

10 JUDGE BARNETT: They're not?

11 (Laughter.)

12 THE WITNESS: I grew up in Pittsburgh  
13 so --

14 JUDGE STRICKLER: You can be an  
15 anti-fan too and hate the team and hope to  
16 watch them lose.

17 THE WITNESS: Well, true, true. No,  
18 but I do think you also get a -- you know,  
19 there's certainly a level of fan that --  
20 nationally that want to see all the games.  
21 There's also a level of fan that just will  
22 watch a national game if it's on. Maybe a more  
23 casual sports fan.

24 But, you know, specifically with  
25 respect to super-stations, no, I mean, I will



1 tell you I was involved in the decision, we saw  
2 the value of every time it came up for renewal.

3 JUDGE STRICKLER: Thank you.

4 BY MS. PLOVNICK:

5 Q. So in the course of your answers to  
6 Judge Strickler's questions, you said "I  
7 assume," "I imagine." And this is because  
8 you're not actually a cable operator, correct,  
9 so you're having to make assumptions about what  
10 cable operators would do in this context?  
11 Because your experience is --

12 A. I mean, I know a lot of folks in the  
13 cable industry, so we speak about matters, but  
14 I have never worked for a cable company.

15 Q. You never worked for a cable company.  
16 You never responded to the Bortz survey?

17 A. That is correct.

18 Q. And so when you were answering some  
19 questions on direct about Dr. Steckel and his  
20 critique of the categories that are used in the  
21 Bortz survey, and you said that you disagreed  
22 with him that they would be confusing to cable  
23 operators, this is based on your experience in  
24 the satellite industry, not based on having  
25 ever worked in the cable industry as a cable

1 operator?

2 A. It's my experience as an MVPD  
3 executive, which I think covers both. We go  
4 through the same analysis with respect to  
5 programming and --

6 Q. That's your assumption based on your  
7 satellite experience, not based on ever having  
8 worked in the cable industry?

9 A. But based on knowing every -- all my  
10 competitors and the folks that have my job at  
11 all the major competitors, cable companies.  
12 I --

13 Q. You're making assumptions about what  
14 they would think or how they would answer these  
15 questions?

16 A. I -- I -- from having -- obviously  
17 from knowing a lot of people in the industry  
18 and having conversations over the 15 years, I  
19 know the importance of these categories of  
20 programming to an executive.

21 Q. Based on --

22 A. But I cannot -- you're right.

23 Q. But you cannot speak for them or what  
24 goes on in their minds or how they may or may  
25 not have understood this?

1           A.     That is -- yes, you are correct.

2           Q.     Having never responded yourself. All  
3 right.

4                     Let's talk just for a minute about the  
5 part of your rebuttal testimony that responds  
6 to Mr. Mansell. And so now your rebuttal  
7 testimony for the record is Allocation Hearing  
8 Exhibit 1011. And the part of your rebuttal  
9 testimony where you respond to Mr. Mansell I  
10 think is pages 5 to 6; is that correct?

11                    And now, Mr. Mansell's testimony is  
12 Exhibit 6002. And we can pull it up and look  
13 at it if you need to, Mr. Hartman, but I'll  
14 represent to you -- and you can tell me if I'm  
15 characterizing this correctly -- that  
16 Mr. Mansell analyzed programming trends for JSC  
17 programming over 30 years, and he concludes  
18 that the number of professional live college  
19 team sports games on local over-the-air  
20 stations has significantly declined over that  
21 time; while the number of games available  
22 through other outlets, such as cable networks,  
23 has increased. Oh, it looks like they already  
24 put it up here.

25                    So that's what Mr. Mansell says in his

1 testimony.

2 A. Okay.

3 Q. So they put up on the screen 6002,  
4 which is Mr. Mansell's testimony.

5 A. Okay.

6 Q. That's what he says?

7 A. I've analyzed -- you're talking about  
8 the first full paragraph?

9 Q. Yes.

10 A. Yes, that's what he says.

11 Q. All right. And so you testified  
12 earlier this morning that you agreed with a lot  
13 of what Mr. Mansell says about the emergence of  
14 regional sports networks and changes in the  
15 industry over the 30 years that he analyzed?

16 A. That's -- I did agree with his  
17 testimony that there have been more and more  
18 regional sports networks launching over the  
19 last 15 or 20 years, yes.

20 Q. Now, in your rebuttal testimony, you  
21 did an analysis focused on comparing the time  
22 period 2004 to 2005 and 2010 through 2013, and  
23 you just looked at changes over that period of  
24 time; is that correct?

25 A. Are you talking about the charts with

1       respect to the carriage for --

2           Q.       Yes, I'm talking about the charts on  
3       page 5, 6, and 7 of your testimony.

4           A.       Okay.

5           Q.       Well -- and actually, if we look at  
6       the first one, Table 1 -- and it's on page 5, I  
7       think that's what on the screen right now --  
8       this is actually you reporting an analysis that  
9       someone else did, right? This is an analysis  
10      that Dr. Israel did?

11          A.       Yeah, that's correct.

12          Q.       And Dr. Israel actually was just  
13      reporting some numbers that other folks had  
14      actually calculated; Mr. Ducey and  
15      Dr. Crawford; is that correct?

16          A.       That's correct.

17          Q.       So do you know how Dr. Israel put this  
18      table together?

19          A.       Well, no, I know he reviewed the  
20      testimony of Ducey and Crawford, but, no, I  
21      took -- I trusted Dr. Israel as in his  
22      position.

23          Q.       And Dr. Israel said -- in your title  
24      you say that this is weighted by subscribers.  
25      Do you know if it's subscribers or subscriber

1 instances?

2 A. For which one? I'm sorry.

3 Q. The title to Table 1. It says Share  
4 of Compensable Minutes by Claimant Group  
5 Weighted by Subscribers.

6 Do you know if the weighting was done  
7 by subscribers or subscriber instances? Or do  
8 you even know what a subscriber instance --

9 A. Sorry, you're talking about subscriber  
10 instances, people watching the number of --

11 Q. Right. Do you believe which it is?

12 A. Yeah, I don't.

13 Q. And did you analyze what Dr. Israel or  
14 Mr. Ducey or Dr. Crawford relied on to come up  
15 with these numbers?

16 A. No, I did not.

17 Q. All right. You just took them  
18 verbatim as reported by Dr. Israel; is that  
19 correct?

20 A. I read Dr. Israel's testimony and,  
21 yes, I trusted Dr. Israel.

22 Q. And same for moving over here to page  
23 6, 7, you have here some tables reporting JSC  
24 telecasts on WGNA, Fox, and, carrying on into  
25 page 7, these are Major League Baseball

1 telecasts on Fox, NFL telecasts on Fox.

2 These tables say underneath source,  
3 Bortz Media compilation. Did you rely on  
4 Mr. Trautman at Bortz to prepare these tables?

5 A. Well, he sent me the -- I got backup  
6 with respect to these game numbers.

7 Q. So you actually reviewed the backup --

8 A. Yes.

9 Q. -- underlying these tables?

10 A. Yes, I did.

11 Q. And you focused, in those tables,  
12 solely on WGNA and Fox, correct?

13 A. Yes, that's correct.

14 Q. You did not look at all other  
15 stations?

16 A. I -- no, I think these were the --  
17 when you look at, certainly with WGNA, it was,  
18 you know, by far, I think, but certainly with  
19 satellite and cable, the biggest revenue  
20 source, I guess, for -- going into the  
21 Copyright Office.

22 But if you're asking whether we looked  
23 at 500 stations, not to my knowledge.

24 Q. But Mr. Mansell did not limit his  
25 analysis to WGNA and Fox, did he?

1       A.     I -- no, it does not appear that he  
2       did. But, again, I think when you're looking  
3       at -- for purposes of this hearing and what's  
4       being compensated on, I think that these were  
5       the important numbers to focus on.

6       Q.     So you think that the Judges should  
7       disregard all of the other distantly broadcast  
8       stations out there that aren't Fox or WGNA?

9       A.     Well, I don't know that -- you know,  
10      without having seen all the -- I'm not sure how  
11      many distant signals were carried that were  
12      carrying sports at the time amongst --

13      Q.     A lot more than Fox and WGNA. Let me  
14      represent that to you. Do you trust that  
15      representation?

16      A.     I would have to look at the numbers.

17      Q.     All right. Well, do you know how much  
18      compensable programming was aired on WGNA?

19      A.     Oh, it's mostly the sports. There  
20      were some other programming, programs that were  
21      compensable for WGNA.

22      Q.     But it's a small number of minutes  
23      total that are compensable on WGNA; is that  
24      correct?

25      A.     For which category? For which --



1 Q. For all categories. The vast majority  
2 of the programming on WGNA is not compensable  
3 in these proceedings. Is that correct?

4 A. With -- I have not reviewed that  
5 material, but I know that a good portion of the  
6 programming was not compensable but the sports  
7 is what was compensable.

8 Q. But you haven't reviewed that  
9 information about what was compensable and what  
10 wasn't compensable on WGNA?

11 A. Well, I've seen -- yes, it has been a  
12 while since I reviewed it, but I did review it,  
13 yes.

14 Q. You reviewed it, but you don't recall?

15 A. I can't cite it to you.

16 Q. But you know it's a small amount?

17 A. I know that -- but I don't think for  
18 purposes of this hearing, I guess, I'm not sure  
19 what -- you know, the sports was compensable,  
20 and I think that's what's the important part.

21 Q. Well, sports is not the only category  
22 at issue in this proceeding, is it?

23 A. No, it's not.

24 Q. Yeah. So the other signals and the  
25 other categories of programming are also

1 important to the Judges in their consideration,  
2 are they not?

3 A. I'm sure they're looking at all the  
4 stations, yes. And I guess if I could just say  
5 one thing. I'm not sure for the period we're  
6 talking about here that -- without seeing your  
7 analysis, I'm not sure if the period 2010  
8 through 2013 we're talking about here, I don't  
9 know how many local stations we were talking  
10 about that may have lost sports.

11 Q. May have launched sports?

12 A. Lost, lost.

13 Q. Lost sports?

14 A. Yes, lost. When he's doing his  
15 analysis here, you know, I was really focusing  
16 on the prior period and then the current period  
17 that we're --

18 Q. You were focused on the '04-'05 period  
19 versus the 2010 --

20 A. Well, the -- right, and the 2010 being  
21 obviously the most important period.

22 Q. You didn't consider the entire period  
23 that Mr. Mansell considered or all the stations  
24 he considered?

25 A. Well, I considered -- my point was

1     that we're talking about the 2010 through 2013  
2     period here for compensable purposes, so I  
3     don't know. I don't have an analysis of how  
4     many local stations lost sports during that  
5     period.

6           Q.     During 2010 through 2013?

7           A.     Yes, which I think would be relevant.

8           Q.     One more follow-up -- actually a  
9     couple more follow-up questions.

10                   In your testimony just in general, and  
11     this is switching gears a bit, you mentioned  
12     some -- HBO, ESPN, Disney, USA, different  
13     things. These are all cable networks; is that  
14     correct?

15          A.     Yes, the ones you mentioned?

16          Q.     Yes.

17          A.     Yes.

18          Q.     And the ones that -- I'm trying to  
19     remember all the ones you said.

20          A.     Yes, yes.

21          Q.     Those are cable networks and they are  
22     not distant broadcast signals?

23          A.     They are not distant broadcast  
24     signals.

25          Q.     Or local broadcast signals. And one

1 other follow-up question just coming back to  
2 the Bortz survey question very quickly.

3 Did you -- when you were asking -- the  
4 hypothetical questions that Judge Strickler was  
5 asking you about how you would have answered  
6 Question 4a, what volume of programming, if  
7 any, would you have had in mind in considering  
8 those questions? If you were responding to the  
9 Bortz survey and you were considering distant  
10 signals and the different bundling type issues  
11 that Judge Strickler was asking you about?

12 A. I'm sorry, I don't -- what do you mean  
13 by volume?

14 Q. Would you have had any particular  
15 volume of programming in mind when you were  
16 evaluating and assigning value to the different  
17 categories of programming?

18 A. Meaning would I -- if there was 100  
19 hours of sports versus two hours of --

20 Q. Would you know any particular volume  
21 or would you have had any particular volume in  
22 mind for any particular category?

23 A. Well, I'm sorry, I was really having  
24 trouble. You know, you're looking at the --  
25 would I know every program that was on there

1 and what -- every program and what category it  
2 fit into for every signal?

3 Q. I guess that's -- that's one way to  
4 look at my question. Would you be thinking  
5 about every one of the individual programs in  
6 all of the signals or how much total those  
7 comprise?

8 A. I guess I would look at -- you know,  
9 again, you're bringing in a distant signal  
10 because there's certain programming on that  
11 signal that's important to you. So I would not  
12 know every program that was on, I don't think,  
13 that was on every distant signal that I  
14 carried.

15 But if I'm importing something, I'm  
16 probably importing it for a reason, so I would  
17 probably know that -- kind of what was  
18 important to me on that signal.

19 Q. And so you said you wouldn't know  
20 every program. And you probably wouldn't know  
21 the minutes of programming that they totalled,  
22 how many minutes of each category of  
23 programming?

24 A. I don't think anybody would know that  
25 but -- yes.

1 Q. All right. Thank you.

2 MS. PLOVNICK: I have no further  
3 questions, Your Honor.

4 JUDGE BARNETT: Thank you.

5 Mr. MacLean?

6 MR. MacLEAN: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. MacLEAN:

9 Q. Good morning, Mr. Hartman.

10 A. Good morning.

11 Q. I'm Matthew MacLean. I represent the  
12 Settling Devotional Claimants.

13 A. Okay.

14 Q. I first want to ask something about --  
15 about something you said about network  
16 programming and your decision to retransmit  
17 network programming. And I believe you said  
18 that, aside from WGNA, this was some of the  
19 programming that you retransmitted  
20 predominantly?

21 A. On a distant network basis?

22 Q. Yes.

23 A. Yes.

24 Q. Could you explain why you would have  
25 retransmitted network programming on a distant

1 network basis?

2 A. Oh, I'm sorry if I was speaking more  
3 -- if I was misspeaking. What I meant was when  
4 you looked at -- again, when you look through  
5 other statement of accounts, the DirecTV  
6 statement of accounts for the period we're  
7 talking about here, and when it lists the  
8 stations that we're paying on, you know, like I  
9 said, WGN is obviously this huge tranche of  
10 75 percent, and then you have, I guess I should  
11 say network affiliated stations.

12 Q. Sure.

13 A. Maybe that's -- you know, so when we  
14 were -- at the time when DirecTV was trying to  
15 figure out how best to service our customers,  
16 before we could launch every market, it was  
17 important to have the -- what I would call the  
18 big four broadcast networks in market, whether  
19 it was an out-of-market signal or not, network  
20 affiliates, because it carried the sports  
21 programming, the prime time programming that  
22 were important to customers.

23 I guess that's what I was getting at.  
24 And that's the whole -- you know, that's the  
25 vast majority of what we paid on, as I

1 understand it.

2 Q. And when you say prime time  
3 programming, you're referring to basically  
4 nationwide network programming?

5 A. Network -- the programming that comes  
6 from the corporate level network, yes.

7 Q. In what kinds of markets would you be  
8 retransmitting network programming on a distant  
9 basis?

10 A. So I guess, like I was saying -- and  
11 this is more in the early days because DirecTV  
12 has launched pretty much every market now and  
13 has for -- has been in most markets for at  
14 least several years, probably eight or ten.

15 So if there was a market that DirecTV  
16 had not launched yet, you know, pick a number,  
17 200 markets, Burlingame, Iowa, or something, if  
18 it did not have the capacity to launch, you  
19 know -- just briefly, I don't know if you know,  
20 with satellite it's launch one, launch all. So  
21 if we launch a local station in a market, we've  
22 got to launch all local stations under either  
23 must-carry or retrans. So, obviously, we had  
24 to be very careful about which markets we  
25 launched because we were a satellite company,



1 we were using spot beam technology, which is  
2 just very difficult to figure out and get, you  
3 know, the number of stations you need into a  
4 local market on a national -- using a national  
5 satellite.

6 But, anyway, so the point would be  
7 that when we were launching -- we were looking  
8 at different markets and we were allowed to  
9 bring in a distant signal, again, what was most  
10 important to us were affiliates of the -- of  
11 the big four broadcast networks.

12 So that initially I think was the New  
13 York ABC, NBC, CBS, and Fox, and L.A. NBC, CBS,  
14 ABC, and Fox.

15 Q. And that's because in a particular  
16 market, if it didn't have its own local network  
17 affiliate station, you would want to import a  
18 station so that you'd have that network  
19 programming?

20 A. No, there were two -- I guess you  
21 could look at it -- again, it was so difficult,  
22 sorry if it's kind of confusing, but because we  
23 had used -- you know, cable is already  
24 entrenched. They could launch every market.  
25 They have a cable plant that you can just flip

1 a switch and you can launch 20 local channels.  
2 Because DirecTV had to take its national  
3 satellite capacity and try to figure out how to  
4 get -- to launch, you know, 5 different  
5 stations in this town, 20 different stations in  
6 this town, it was a very slow roll-out process.

7 So there was no decision -- once we  
8 launched a market, there was no decision; it  
9 was we launched every channel, every local  
10 station, excuse me, but until we launched a  
11 market, in order to be competitive, it was most  
12 important for us to carry -- again, these were  
13 markets we hadn't launched any local station  
14 yet, to carry affiliates of the big four  
15 broadcast networks.

16 Q. Are there local markets that don't  
17 have all four big four?

18 A. Yes.

19 Q. And in those markets that don't have  
20 all four big four networks, is it important to  
21 import a network channel?

22 A. Yes, to distantly import a -- yes.  
23 You mean a Fox or an ABC? Yes.

24 Q. And in a DMA or in a market like that,  
25 that doesn't have its own local ABC, NBC, CBS

1 station, is it -- is there value in importing  
2 the network programming into that market?

3 A. So if there's a market that only has  
4 three of the big four?

5 Q. Sure.

6 A. Yes, there is value in bringing in --  
7 again, because, you know, for instance, sports,  
8 if it's a Fox -- if we don't -- if a station --  
9 if a small market did not have a Fox affiliate  
10 for some reason, yes, it was very important to  
11 bring in a national -- to bring in a Fox so  
12 that they could see their football games.

13 Q. What are some characteristics of those  
14 markets that don't have all four of the big  
15 four network broadcast stations?

16 A. So some markets --

17 Q. Network affiliated?

18 A. So, yeah, so markets that don't have  
19 -- that -- they would be -- I can't give you a  
20 number. They would be very small markets. You  
21 know, some of the major markets have -- L.A.,  
22 for instance, has probably 20 or 30 local  
23 stations. But a smaller market -- and I don't  
24 know that there are that many, but they would  
25 -- it would be a much smaller market, very

1 small market.

2 Q. Do markets like that tend to have  
3 lower subscription fees on average?

4 A. No.

5 Q. Across the country?

6 A. No. I mean, our pricing, it's pretty  
7 much -- except for some of the access fees,  
8 it's pretty much national pricing that DirectTV  
9 has. So, no --

10 Q. For DirectTV, it's national?

11 A. Yes, yes. So the fee, what you would  
12 pay in a smaller market -- and there was  
13 another reason too, because you wanted to -- if  
14 your customer is paying the same price, you  
15 really would like them to have the same  
16 programming that everybody across the country  
17 has.

18 Q. Shifting gears a little bit here, I'd  
19 like to take a look at page 7 of your written  
20 direct testimony. Focusing on paragraph 24,  
21 you say you've reviewed the written testimony  
22 from the 2004-2005 proceedings of Judith Meyka?

23 A. Um-hum.

24 Q. And that she testified as to the  
25 importance of live sports programming to a

1 cable operator's programming line-up. So you  
2 agreed with the testimony of Ms. Meyka?

3 A. Yes, I did.

4 Q. Do you know Ms. Meyka personally?

5 A. I do.

6 Q. You've never chastised her for  
7 dishonesty?

8 A. For dishonesty, oh, no.

9 JUDGE STRICKLER: Try to think up your  
10 own question.

11 (Laughter.)

12 THE WITNESS: Sorry. I just got what  
13 I think you were saying. No, I'm friendly.  
14 I've known her from the business for probably  
15 10 or 15 years.

16 BY MR. MacLEAN:

17 Q. Okay. So I'm showing you here  
18 Allocation Exhibit -- Hearing Exhibit 1037,  
19 which is designated and is in evidence already.  
20 And this is the testimony of Judith Meyka. Is  
21 this the testimony that you reviewed?

22 A. Yes, it looks like it.

23 Q. Taking a looking at paragraph 27, and  
24 I'm focusing here in the middle of the  
25 paragraph, "live sports programming, local news

1 and public affairs programming and Public  
2 Television programming are particularly  
3 important components of the offering because  
4 they bring unique content that may not be  
5 available on other channels in the line-up."

6 Do you agree with Ms. Meyka on that  
7 statement?

8 A. You know, I do think I will say that,  
9 again, satellite and cable are different. And  
10 so cable is more flexible in what they can  
11 bring into a local market.

12 They can bring in -- if they've  
13 already launched a market, they can bring in a  
14 distant signal, and I don't know the rules  
15 exactly, without getting permission of either  
16 the stations in the market, if there's a  
17 competing station. And satellite is just not  
18 -- it doesn't have the same rules, but --  
19 again, I would say that I think if you're  
20 serving a market and you have capacity, you  
21 know, again, I think it's just like the general  
22 market platform. I think you do want to serve  
23 as many customers with as much different  
24 programming as you can.

25 Q. And live sports programming, local

1 news and public affairs programming and Public  
2 Television programming are all important  
3 components of that offering that you want to  
4 give your subscribers?

5 A. They're different levels of value,  
6 but, you know, again, every -- I think, most  
7 genres of programming are important to the  
8 platform. It's just a matter of degrees.

9 Q. And so looking at her footnote here,  
10 footnote 3, and I am so glad that we got a  
11 footnote here, "to a lesser extent" -- you  
12 would agree -- "devotional and Canadian  
13 programming also may also add a unique element  
14 to the programming mix that might otherwise be  
15 unavailable to a cable operator"?

16 A. I think this may have been where Toby  
17 was going -- Ms. Berlin was going with her  
18 testimony.

19 Q. This is Ms. Meyka's testimony.

20 A. No, but I'm saying -- I'm sorry. I'm  
21 just -- I'm trying to make the point that I --  
22 you know, again, that there's -- we do try to  
23 serve as many -- with 20 million customers, we  
24 try to serve as many customers, you know,  
25 everybody's needs to the extent we had

1 capacity.

2 So I was only bringing up the  
3 Ms. Berlin testimony because I think maybe this  
4 is what she was getting at with her example of  
5 the L.A. and New York, bringing in a distant  
6 signal, that, you know, it was trying to serve  
7 a niche.

8 It's -- you know, capacity is just  
9 very tight. So, you know, we would try to  
10 launch as many stations and cable networks as  
11 we could to serve our customers within the  
12 bounds of, you know, the value equation and the  
13 capacity we had.

14 Q. And among those were devotional  
15 programs to serve devotional customers?

16 A. I'm not aware of any devotional  
17 programs that we -- networks, excuse me, that  
18 we brought in on a distant basis, but it could  
19 be the case. And, again, I can't speak to her  
20 from a cable perspective. She might have a  
21 different -- you know, slightly different view  
22 based on the fact that they have more  
23 flexibility in what they bring in.

24 Q. Now, turning to Ms. Berlin's  
25 testimony, (Confidential session.)



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(Return to open session.)

JUDGE STRICKLER: Can you ask the  
question again? I'm sorry.

(Return to confidential session.)

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17                   (Return to open session.)

18                   JUDGE BARNETT:  Thank you.

19   BY MR. MacLEAN:

20       Q.     Would you say that DirectTV valued its  
21   religious customers?

22       A.     I would say DirectTV valued every  
23   single customer.  So I think we --

24       Q.     DirectTV at one point offered Easter  
25   and Christmas specials from Crystal Cathedral

1 on a Pay Per View basis; is that right?

2 A. I think that is correct, yes.

3 Q. Would you regard that as devotional  
4 programming?

5 A. I suppose so.

6 Q. DirecTV launched its own devotional  
7 programming, including church services from  
8 University of Notre Dame; is that right?

9 A. I think that's correct, yes.

10 Q. And these programs, DirecTV felt,  
11 served an important niche audience; would you  
12 agree with that?

13 A. I think that, again, there's -- you  
14 could look at a multiple kind of diverse --  
15 each audience we served. We, you know, had  
16 packages of Italian programming. You know, we  
17 served -- again, you could look at -- you could  
18 probably slice and dice it numerous ways as to  
19 the different types of programming -- customers  
20 we served with our programming.

21 So, yes, I mean, devotional would be  
22 one of the many kind of niches that we tried to  
23 serve.

24 Q. You described sports programming as  
25 high-value programming, right?

1 A. Um-hum.

2 Q. Right?

3 A. Um-hum.

4 Q. And you do have to answer yes or no  
5 for the reporter.

6 A. Oh, yes. I'm sorry, yes.

7 Q. I'm sorry, that's --

8 A. Yeah.

9 Q. And that -- and I believe this is  
10 because, in your words, folks are really  
11 passionate about their particular sports teams;  
12 would you agree with that?

13 A. I would agree with that.

14 Q. Many of these -- I mean, there are  
15 some devoted fans of these sports teams, would  
16 you agree?

17 A. Yes.

18 Q. They idolize their heroes?

19 A. That is correct.

20 Q. They -- some of them, I mean, they'll  
21 watch these games religiously sometimes, right?

22 (Laughter.)

23 THE WITNESS: They're very passionate  
24 about watching their games.

25 BY MR. MacLEAN:

1           Q.     I don't -- I don't want to stretch  
2     this, you know, analogy too far, but do you  
3     know what Tebowing is?

4           A.     I do.

5           Q.     Could you explain?

6           A.     Can I explain? As in taking a knee?

7           Q.     In...

8           A.     I don't know -- it has been a while.

9           Q.     In prayer?

10          A.     In prayer, yeah, I know he is -- he  
11     was big a few years ago.

12          Q.     Would you agree with me that there's  
13     some people that are very passionate about  
14     their religions?

15          A.     Yes, I would say but as a matter of  
16     degrees and, you know, I think if you're asking  
17     whether or not I could value the types of  
18     programming simply, I would not.

19          Q.     I understand.

20          A.     Yeah.

21          Q.     But, I mean, there are people out  
22     there who are passionate about their religion?

23          A.     There are, and I think it's a matter  
24     of if you're looking at kind of the whole, you  
25     know, discussion we've had been having around

1     what's important to the customer, and, again,  
2     we want to serve every customer.  If, you know,  
3     we lost certain networks, they would be less  
4     detrimental to us than losing sports networks.  
5     I consider sports at the top of networks that  
6     we just couldn't lose because we would lose  
7     customers.  I'm not sure on the devotional side  
8     if that's the case.

9           Q.     Well, DirecTV carried religious  
10    programming to serve religious customers,  
11    right?

12          A.     Yes.

13          Q.     Are you aware that religious  
14    programming is often similar to sports  
15    broadcast live in the form of church services?

16          A.     Yeah.  Okay.  I don't -- I'm sorry, I  
17    don't watch a lot of devotional programming,  
18    but, yes, I imagine they have services that are  
19    broadcast live.

20          Q.     And that's an opportunity similar to  
21    feeling like you're there for a sports game, to  
22    feeling like you're there, part of a religious  
23    community in a church service?

24          A.     For some small group of customers,  
25    yes.

1           Q.     So -- and, finally, I just want to  
2     take a look at your testimony, page 5, where  
3     you --

4           A.     Direct or my rebuttal?

5           Q.     This is your direct testimony, page 5,  
6     where you refer to the Bortz results.

7           A.     Um-hum. Yes.

8           Q.     And you'll see, I mean, certainly, you  
9     know, we're not at the top of the list here,  
10    but devotional and religious programming has  
11    Bortz results within the 4 to 5 percent range.  
12    Do you see that?

13          A.     Yes.

14          Q.     In your experience as a system  
15    operator, do you think that that's a reasonable  
16    range for a valuation of religious programming?

17          A.     Yes.

18                 MR. MacLEAN: Thank you. I have no  
19    further questions.

20                 JUDGE BARNETT: Let's take our morning  
21    recess, 15 minutes.

22                 (A recess was taken at 10:27 a.m.,  
23    after which the trial resumed at 10:48 a.m.)

24                 JUDGE BARNETT: Please be seated.

25    Other cross-examination for Mr. Hartman?

1                   No? Any redirect?

2                   MR. CANTOR: No redirect, Your Honor.

3                   JUDGE BARNETT: Well, thank you, Mr.

4 Hartman. If I had known that, I would have let

5 you go before the break.

6                   THE WITNESS: No worries. I have all

7 day.

8                   JUDGE BARNETT: Thank you.

9                   THE WITNESS: Thank you, Your Honors.

10                  JUDGE BARNETT: And our next witnesses

11 are from the Program Suppliers?

12                  MR. OLANIRAN: Yes, Your Honor.

13                  JUDGE BARNETT: Mr. Steckel? Dr.

14 Steckel?

15                  MR. OLANIRAN: Dr. Steckel. Program

16 Suppliers call Dr. Joel Steckel.

17                  JUDGE BARNETT: It is not an easy

18 place to get, or an easy place to be for that

19 matter.

20                  THE WITNESS: But it is nice and snug

21 I can see.

22                  JUDGE BARNETT: Will you please raise

23 your right hand.

24 Whereupon--

25                                 JOEL H. STECKEL,



1     having been first duly sworn, was examined and  
2     testified as follows:

3                 JUDGE BARNETT:   Please be seated.  
4     Don't mix up your water bottle with any of  
5     those.   It's the second one.

6                 THE WITNESS:   This one?   This is the  
7     one I just -- no, that's right.   Thank you.

8                 JUDGE BARNETT:   Mr. Olaniran.

9                         DIRECT EXAMINATION

10    BY MR. OLANIRAN:

11         Q.     Good morning, Dr. Steckel.   Would you  
12     please state your full name for the record.

13         A.     Good morning.   My name is Joel Howard  
14     Steckel.

15         Q.     And would you please provide us a  
16     summary of your educational background?

17         A.     Yes.   I have a Bachelor of Arts degree  
18     from Columbia University in Mathematics, where  
19     I was elected to Phi Beta Kappa, and my degree  
20     was awarded summa cum laude.

21                 After that I went to graduate school  
22     at the Wharton School of the University of  
23     Pennsylvania where I got three degrees, a  
24     Master of Arts in Statistics, an MBA, and a  
25     Ph.D. awarded jointly by the Departments of

1 Marketing and Statistics.

2 Q. Who is your current employer and what  
3 is your current position?

4 A. I am a Professor of Marketing at the  
5 Leonard N. Stern School of Business at New York  
6 University.

7 Q. And where else have you worked?

8 A. Oh, before NYU -- and actually during,  
9 including sabbatical -- I have had either  
10 permanent or visiting positions at Columbia  
11 University, Yale, UCLA, and the Wharton School.

12 Q. So in all, how -- how long have you  
13 been teaching?

14 A. 37 years.

15 Q. And what is the subject matter of your  
16 specialty?

17 A. I teach marketing. My particular  
18 interests are marketing research and marketing  
19 strategy and the relationship between them,  
20 managerial decision-making, and branding, and  
21 analyzing data obtained through electronic  
22 commerce.

23 Q. And how long have you taught at NYU?

24 A. This is year number 29.

25 Q. And do you hold any other position at

1 NYU?

2 A. Yes. I am the Vice Dean for Doctoral  
3 Education at the Stern School. It means I am  
4 the chief executive and I oversee all eight of  
5 our wonderful doctoral programs.

6 Q. And have you held other positions at  
7 NYU?

8 A. I have been the Department Chair of  
9 two departments. From 1998 to 2004, I was the  
10 Department Chair of the Marketing Department.

11 Currently, in addition to my Vice  
12 Dean's duties, I serve as the Acting  
13 Chairperson of the Accounting Department, while  
14 the school looks for someone to replace me.

15 Q. And are you a member of any  
16 professional organizations?

17 A. I am. I'm a member of the American  
18 Marketing Association, the American Statistical  
19 Association, the American Association for  
20 Public Opinion Research, the American  
21 Psychological Association, the International  
22 Trademark Association, the Society for Consumer  
23 Psychology, the INFORMS Society for Marketing  
24 Science, sometimes called ISMS. And there may  
25 be one or two others that I just am not

1 remembering.

2 Q. Okay. And what is ISMS? I'm sorry.

3 A. ISMS is the INFORMS. INFORMS is a  
4 professional organization of people, of  
5 academics and practitioners, who study  
6 management science, or the application of  
7 scientific methods to management problems.

8 ISMS is the INFORMS Society for  
9 Marketing Science, which is the branch of  
10 INFORMS that specializes in marketing problems.

11 Q. And have you had any leadership  
12 positions in any of these professional  
13 organizations?

14 A. I was the founding president of ISMS.

15 Q. And have you published any books and,  
16 if so, how many?

17 A. I have published four books. And I'm  
18 working on a fifth and sixth as we speak.

19 Q. And when was your most recent book  
20 published?

21 A. November 2017.

22 Q. And in what areas have you published?

23 A. My first three books were -- one was a  
24 textbook on marketing research. Two were a  
25 textbook and a trade book, both on the same

1 subject; the Interface Between Marketing  
2 Research and Marketing Strategy.

3 The most recent one, available on  
4 Amazon --

5 (Laughter.)

6 THE WITNESS: -- the most recent one  
7 is called Shift Ahead, and it is how to -- how  
8 to stay relevant, how businesses stay relevant  
9 in a fast-changing environment.

10 BY MR. OLANIRAN:

11 Q. Have you published any articles?

12 A. Yes, several.

13 Q. And how many, would you say?

14 A. I would say in the neighborhood of 50  
15 to 55, 50 to 60, somewhere.

16 Q. And what are the general subject areas  
17 of your articles?

18 A. Oh, my research has been very  
19 eclectic. I've -- my research has appeared in  
20 psychology journals, statistics journals,  
21 marketing journals, and actually even law  
22 journals and law reviews.

23 Q. And have you been qualified by a court  
24 or a tribunal as an expert witness before?

25 A. Yes, I have.

1 Q. And approximately how many times have  
2 you been qualified as an expert witness?

3 A. Well, I'm going to count two  
4 categories. One where I have testified in  
5 court and another where reports I have written  
6 or studies I have done have been used in  
7 summary judgment or denials of class  
8 certification where I was never -- I never  
9 testified under oath, but I'm going to count  
10 that as the court giving credibility to my  
11 views. And I would say that is probably  
12 totaling about 25.

13 Q. And have you worked as a  
14 non-testifying expert outside of the two  
15 categories that you just described?

16 A. I have. I have written several  
17 reports on cases that have settled. I have  
18 worked as a consulting expert. I have actually  
19 been a testifying expert on cases where I was  
20 deposed, but the case never went to trial,  
21 where I didn't have an opportunity to be  
22 qualified by the court.

23 And I would say when you add up all  
24 those together, it's probably another 40.

25 Q. Okay. And before what types of bodies

1 have you been qualified by?

2 A. Federal Court, District Court,  
3 Arbitration Boards, NAD proceedings.

4 Q. What are NAD proceedings?

5 A. The National Advertising Division of  
6 the Better Business Bureau. And that's -- I  
7 think that's about it.

8 Q. And can you tell us the substantive  
9 areas of law involved in the cases in which you  
10 have been involved as an expert witness,  
11 whether you testified or not?

12 A. Sure. A lot of it is trademark. Some  
13 of it is patent, antitrust, licensing  
14 agreements, tax. Did I say -- I said patents.  
15 It depends, if there is an issue of -- related  
16 to marketing or data analysis that I can  
17 provide value.

18 Q. Okay. And in what subject areas have  
19 you been qualified to testify in, I mean, in  
20 the subject areas of your expertise?

21 A. Marketing, marketing research,  
22 consumer surveys, marketing strategy, branding,  
23 forecasting, valuation, et cetera.

24 Q. Okay. And could you describe  
25 generally your experience with survey research?

1           A.     Survey research is a big part of my  
2     life. I was -- first of all, as I mentioned  
3     earlier, I am an author of a textbook on  
4     marketing research, much of which is about how  
5     to conduct consumer surveys and surveys in  
6     general.

7                   A lot of my research has been on  
8     survey methodology. When I took a sabbatical  
9     once, I went in-house at a survey research firm  
10    to be an in-house consultant for a few months.

11                  I was the editor of a journal for six  
12    and a half years, in which case I evaluated  
13    probably a couple of hundred surveys a year, as  
14    to their publishability. Pretty broad.

15           Q.     And have you conducted your own  
16    surveys?

17           A.     Very frequently.

18           Q.     And how many surveys would you say you  
19    have conducted on your own?

20           A.     Probably hundreds.

21           Q.     And of those surveys that you  
22    conducted on your own, what percentage utilize  
23    survey questionnaires?

24           A.     I would say almost all of them, if not  
25    all of them. I can't recall any that did not.



1 Q. And how many of those survey  
2 questionnaires did you design on your own?

3 A. All of them.

4 Q. And have you ever evaluated survey  
5 research conducted by others?

6 A. Yes.

7 Q. And about how many?

8 A. Well, as I said, as journal editor,  
9 probably a couple hundred a year for six and a  
10 half years. And I have done it in the context  
11 of being an expert in litigation, I don't know,  
12 maybe between 10 and 20 times.

13 Q. And in what industries have you  
14 applied your survey research experience?

15 A. Again, a wide variety. Consumer  
16 packaged goods, consumer electronics,  
17 pharmaceuticals, medical devices, blood glucose  
18 meters, and more recently slot machines.

19 Q. And has any of your survey work  
20 involved valuation?

21 A. Yes.

22 Q. And could you give an example of that,  
23 please?

24 A. Sure. Let me -- let me start with a  
25 litigation that was -- that the material of

1     which I know is in the public domain. Well, I  
2     don't even have to go into all the detail.

3             The valuing of fat content on a salty  
4     snack food, valuing the use of a brand name on  
5     a residential complex, valuing a patent that  
6     was allegedly infringed in the manufacturing of  
7     a DVR.

8             Q.     Okay. Thank you.

9             And did you submit a more detailed bio  
10    of your background and experience with your  
11    testimony?

12            A.     I did.

13            MR. OLANIRAN: Your Honors, we offer  
14    Dr. Steckel as an expert in market research,  
15    survey research, and valuation.

16            JUDGE BARNETT: Hearing no objection,  
17    Professor Steckel is so qualified.

18            MR. OLANIRAN: Thank you, Your Honor.

19    BY MR. OLANIRAN:

20            Q.     Dr. Steckel, what were you asked to do  
21    in this proceeding?

22            A.     I was asked to do two different things  
23    at two different times. First, I was asked to  
24    render a professional opinion on the 2004-2005  
25    Bortz surveys as to their reliability and

1 validity.

2 And then I was asked to also render a  
3 similar opinion on the 2010-2013 Horowitz  
4 surveys and to express a general opinion as to  
5 which one is more suitable to the current  
6 proceedings.

7 Q. Just a point of correction. You said  
8 2004/2005 Bortz surveys. Did you mean  
9 2010-2013 Bortz surveys?

10 A. Well, that's -- no, I did mean  
11 2004-2005 because that was the first thing I  
12 was asked to do.

13 Q. Okay.

14 A. Right? And compare that to the  
15 structure of the 2010-2013 Horowitz surveys.

16 The second set of tasks I was asked to  
17 perform were -- occurred after the 2010-2013  
18 Bortz surveys were submitted.

19 And therein I was asked to assess  
20 whether any improvements to the 2010 -- from  
21 the 2004-2005 Bortz surveys, alleviated any  
22 concerns I had about those earlier Bortz  
23 surveys.

24 I was also asked to render an opinion  
25 on whether Dr. Nancy Mathiowetz's support of

1 those surveys alleviated any of the concerns I  
2 had.

3 And the third thing I was asked to do  
4 in the second wave of tasks was to render an  
5 opinion on whether the survey submitted by the  
6 Canadian Claimants changed my view of -- of any  
7 of the Bortz surveys.

8 Q. Okay. Thank you for that  
9 clarification.

10 Did you prepare written reports of  
11 your findings and conclusions?

12 A. I did.

13 Q. And you should have a black binder in  
14 front of you with a green cover. Do you see  
15 that?

16 A. I do.

17 Q. Would you please turn to the document  
18 marked as Exhibit Number 6014, 6-0-1-4.

19 A. Yes, sir.

20 Q. And would you please identify that  
21 document?

22 A. This document is the direct testimony  
23 which reflects my work in the first wave of  
24 assignments I was given in this matter.

25 Q. That would be the Written Direct

1 Testimony of Joel Steckel, filed on December  
2 22nd?

3 A. That's correct.

4 Q. Would you please also turn to the  
5 document marked as Exhibit 6015.

6 A. Yes.

7 Q. And would you please identify that  
8 document?

9 A. That document, entitled Rebuttal  
10 Testimony of Joel Steckel, submitted September  
11 15th of 2017, reflects the work I've done in  
12 the second wave of tasks that I mentioned a few  
13 minutes ago.

14 Q. And are these the reports of your  
15 findings and conclusions submitted in this  
16 proceeding?

17 A. Yes, they are.

18 Q. Were you responsible for preparing  
19 these reports?

20 A. I was.

21 Q. And do you have any corrections or  
22 additions to either one of the exhibits?

23 A. Not at this moment.

24 Q. Do you declare Exhibits 6014 and 6015  
25 to be true and correct and of your personal

1 knowledge?

2 A. They appear to be, yes.

3 Q. These exhibits are already admitted  
4 into evidence, so we don't need to move for  
5 admission.

6 I would like to focus on your opinion  
7 and conclusions as set forth in your written  
8 direct testimony, but, first, I wanted to ask  
9 you some questions regarding your understanding  
10 of the compulsory licensing proceeding. Okay?

11 A. Okay.

12 Q. And what is your understanding of the  
13 question at issue in this proceeding?

14 A. That these proceedings are being  
15 conducted to allocate copyright royalties to  
16 the copyright owners of programs that were  
17 distantly transmitted by U.S. cable television  
18 stations in the years 2010 to 2013.

19 Q. And what is your understanding of the  
20 standard which has been used to make the  
21 allocation determination?

22 A. My understanding of the standard is  
23 that the royalties are to be allocated  
24 according to the relative marketplace values of  
25 the programming in each of the categories at

1 issue.

2 Q. And do you know the types of evidence  
3 that decision-makers have relied on in  
4 allocating royalties in past proceedings?

5 A. Well, historically my understanding is  
6 that decision-makers have relied on viewing  
7 data.

8 But in the last couple of proceedings,  
9 my understanding is that decision-makers have  
10 used a survey proffered by the Joint Sports  
11 Claimants and conducted by the Bortz  
12 organization, the Bortz survey, as a basis from  
13 which to base -- to make those allocations.

14 Q. Okay. And I would also like to ask  
15 you some questions regarding survey research,  
16 your knowledge of survey research in general.

17 What is the purpose of surveying as a  
18 research method?

19 A. Surveys are used as a research method  
20 to generalize about the characteristics of some  
21 population from examining information on a  
22 subset of that population. Usually that  
23 population is a set of people or a set of human  
24 beings.

25 So at least in my world survey

1 research most often generalizes about --  
2 generalizes the attitudes, experiences,  
3 opinions or interests of a population at large  
4 by sampling a subset of that population.

5 Q. And are there any generally-accepted  
6 criteria that a survey must conform to in  
7 general?

8 A. There are. Lots of professional  
9 organizations have a wide variety of lists of  
10 these are what a survey should conform to, and  
11 this is how -- the characteristics a survey  
12 should have.

13 But when it comes down to it, in my  
14 view there are really only two things. They  
15 all fall into two considerations. A survey  
16 must be reliable and a survey must be valid.

17 And as researchers we refer to that as  
18 the reliability and validity of the survey.

19 Q. I'm sorry. And what does reliability  
20 mean?

21 A. Okay. I was about to get to that.  
22 Reliability refers to the consistency of any  
23 measure that is taken. So, for example if you  
24 take a measure and I take a measure or if I  
25 take a measure twice, we're going to get the



1 same reading. We're going to get the same  
2 value of the measurement.

3 So -- and validity refers to the  
4 ability of a survey to represent what it is  
5 actually supposed to represent.

6 And a particular type of validity that  
7 is at issue in this case, in my opinion, is  
8 construct validity, which means that what you  
9 are measuring, what your measure actually  
10 reflects what it is you are, indeed, measuring.

11 So let me illustrate. Let me give you  
12 an example with my watch. Sunday was Daylight  
13 Savings Time. It changed. Suppose I forgot to  
14 move my watch ahead.

15 If we looked at my watch, if the  
16 Judges and I all looked at my watch, we would  
17 get the same reading. That would be a reliable  
18 measure of the time.

19 It would not be a valid measure of the  
20 time because it would be wrong. It would not  
21 be reflective of what the time is. It would be  
22 an hour off.

23 So that's an example of the  
24 distinction between reliability and validity.  
25 And so looking at a -- at my watch, which

1 wasn't reset, would be -- would not have  
2 construct validity as a measure of time, but,  
3 if I had reset it, it would.

4 Q. Are there general practice principles  
5 that help ensure validity and reliability of  
6 survey measures?

7 A. There are. And that is, indeed, where  
8 the professional organizations and scientific  
9 governing bodies, if you will, come in. The  
10 Council of American Survey Research  
11 Organizations, the American Association of  
12 Public Opinion Research, all have their own Ten  
13 Commandments of survey research, if you will.

14 The Federal Judicial Center Manual of  
15 Complex Litigation has seven characteristics to  
16 which a survey must conform.

17 Q. Could we go to -- I'm sorry.

18 A. And I believe those are in my direct  
19 testimony.

20 Q. Could we go to page 8. There you go.

21 Would you please talk about the  
22 Federal Judicial Center Manuel of Complex  
23 Litigation and the factors that you were just  
24 talking about?

25 A. Well, this is a list that generally

1 governs a lot of the expert witness work that I  
2 have done and that I have been asked about.

3 This is just one set of criteria that  
4 when you take a look at, are all collectively  
5 designed to ensure the reliability and validity  
6 of a survey that is being performed.

7 For example, the data are accurately  
8 reported, the population is clearly chosen and  
9 defined. One that I think is important here is  
10 that the questions asked were clear and not  
11 leading.

12 Q. Okay. And I also want to ask you, are  
13 you familiar with the survey research type  
14 known as constant sum?

15 A. Yes.

16 Q. And what is constant sum?

17 A. Constant sum scales or constant sum  
18 measures are the types of measures that are  
19 derived when a survey respondent is given a  
20 certain number of points or chips or -- or  
21 specific objects to allocate or marble to  
22 allocate across several categories according to  
23 some criterion.

24 Q. And under what circumstances are  
25 constant sum questions used?

1           A.     Well, constant sum questions are --  
2     are common in marketing research.  If I wanted  
3     to ask a consumer, for example, to allocate 100  
4     chips according to their relative preference  
5     for Coke and Pepsi, and they may say 67/33, and  
6     that gives me some information about which they  
7     prefer and something about the magnitude by  
8     which they prefer one to another.

9           Q.     Now, turning to the testimony that you  
10    discuss, in your testimony, the Bortz -- you  
11    discuss the following testimonies.  You have  
12    the Bortz survey questionnaire used for 2010  
13    through '13; is that correct?

14          A.     Yes.

15          Q.     You also address the Horowitz surveys  
16    used for 2010 through '13; is that correct?

17          A.     Yes.

18          Q.     And then the Bortz survey used in the  
19    '04-'05.  Is that right?

20          A.     Yes.

21          Q.     So let me start first with the 2010  
22    through '13 Bortz survey as addressed in your  
23    testimony.  Okay?

24          A.     Sure.

25          Q.     And what is your understanding of the

1 objective of the 2010 through '13 Bortz survey?

2 A. My understanding is that the Bortz  
3 survey was designed to measure the relative  
4 value to cable system operators of the various  
5 categories of retransmitted, distantly  
6 retransmitted programming.

7 Q. Okay. And what is your general  
8 understanding of the process for the 2010  
9 through '13 Bortz survey?

10 A. Well, I don't think there was anything  
11 tremendously unusual about the process, that a  
12 stratified sample was constructed of Form 3  
13 cable systems, which were then subject to a --  
14 which -- at which an individual was identified  
15 as being the person most responsible for signal  
16 investment decisions.

17 And then that individual was put  
18 through a telephone interview in which some  
19 initial questions were asked, some warm-up or  
20 lead-in questions, leading to the -- what I  
21 like to call the money question, which was the  
22 constant sum resource allocation question.

23 Q. And let's now switch over to your  
24 understanding of the Horowitz -- the 2010  
25 through '13 Horowitz survey.

1                   What is your understanding of the  
2     objective of the Horowitz 2010 through '13  
3     survey?

4           A.     Well, the Horowitz survey had two  
5     objectives, as I understand it. One is similar  
6     to the Bortz survey, to assess the relative  
7     value of the categories of programming.

8                   But also the Horowitz survey put forth  
9     a few improvements, quote/unquote, to the  
10    original Bortz survey, to the 2004/2005 version  
11    of the Bortz survey.

12                   And a secondary objective was to see  
13    what the impact of those improvements would be.

14          Q.     Okay. And what is your understanding  
15    of the process undertaken by Horowitz in  
16    conducting the 2010 through '13 survey?

17          A.     Well, as I say, the process was  
18    relatively similar, except for the  
19    implementation of some alleged improvements.

20          Q.     Do you have that in your -- in your --

21          A.     It's in my report, in my direct  
22    testimony. And I believe it is on pages, if I  
23    remember, 19 to 20. Did I get that right?  
24    Yes, I did.

25          Q.     I think it starts on page 19 of

1 Exhibit 6014.

2 A. Okay.

3 Q. Please proceed.

4 A. So here are the improvements or,  
5 unlike Bortz, which has only one category for  
6 sports, Horowitz distinguishes between live  
7 professional and college team sports.

8 Horowitz enhances program category  
9 descriptions by providing examples. Bortz --  
10 and this is relative to the 2004-2005 Bortz  
11 survey.

12 Q. Okay.

13 A. Bortz asks for resource allocation  
14 from a complete predefined list. The Horowitz  
15 survey customizes its list. Bortz repeatedly  
16 asks questions about types of programming  
17 during the years across all stations, other  
18 than the national network programming from ABC,  
19 CBS, and NBC.

20 The Horowitz survey continuously --  
21 continually reminds respondents about the  
22 specific broadcast stations at issue.

23 More specific, the Bortz survey does  
24 not include systems that carry only PBS  
25 stations or systems that carry only Canadian

1 stations. The Horowitz survey does.

2 The Horowitz survey provides warm-up  
3 questions, which the updated Bortz survey did,  
4 intended to enhance the likelihood of low  
5 reason, non-reflective responses. Bless you.

6 JUDGE BARNETT: Thank you.

7 THE WITNESS: And, unlike the Bortz  
8 survey, the Horowitz survey reminds responses  
9 not to assign any value to programs that are  
10 substituted for WGN's blacked-out programming.  
11 And I believe that's it.

12 BY MR. OLANIRAN:

13 Q. Okay. Now, just to make the record  
14 clear, you made the -- you keep making the  
15 reference to the '04-'05 Bortz survey.

16 To be clear, your direct testimony  
17 addresses the Horowitz survey, which is based  
18 on the '04-'05 Bortz survey; is that correct?

19 A. The improvements to the Horowitz  
20 survey made or the changes the Horowitz survey  
21 made were changes from the '04-'05 Bortz  
22 survey, not changes from the 2010 to 2013 Bortz  
23 survey.

24 Q. Okay. Because as of when the Horowitz  
25 report was submitted, this was during the



1 direct phase of the submissions; is that  
2 correct?

3 A. Right. They obviously had no access  
4 to the Bortz 2010-2013 surveys.

5 Q. Thank you. And do you have an opinion  
6 about whether the 2010-'13 Bortz survey and the  
7 2010 through '13 Horowitz survey can assist in  
8 the determination of relative marketplace value  
9 of programming at issue in this case?

10 A. I do.

11 Q. And what is that opinion?

12 A. Well, my opinion is that, frankly, I  
13 don't think either one of them can. I don't  
14 think either one of the surveys is useful for  
15 determining the relative marketplace value of  
16 the various categories of programming in the  
17 retransmitted signals.

18 Q. And why not?

19 A. Lots of reasons. So -- but they fall  
20 into two categories. One is that the measure  
21 obtained from the constant sum resource  
22 allocation question lacks construct validity  
23 for marketplace value. In other words, it does  
24 not measure marketplace value.

25 The second is that the task that a

1 respondent goes through in answering that money  
2 question, the constant sum resource allocation,  
3 is really too complex to be reliable or valid  
4 at all.

5 Q. So let's take the first reason, which  
6 is the construct validity issue.

7 So are you saying that the constant  
8 sum allocation question in the Bortz survey  
9 does not measure marketplace value?

10 A. That's exactly what I'm saying.

11 Q. And can you explain this, what you  
12 mean, and why you think it doesn't?

13 A. Sure, I can. It would be useful if we  
14 have a copy of a Bortz questionnaire.

15 Q. Could we pull up Exhibit 6020, please.  
16 Thank you.

17 A. Okay.

18 Q. Do you see that in front of you?

19 A. I do.

20 Q. Okay. Now, this is Exhibit 6020 and  
21 it is a restricted exhibit. But I don't --

22 JUDGE BARNETT: Mr. Olaniran, I think  
23 Ms. Plovnick just used a blank form in her  
24 examination of the prior witness. I see no  
25 reason we can't use that blank form instead of

1 one that is filled in.

2 MR. OLANIRAN: We would have to go to  
3 Exhibit, I think, 1001. I don't know if she  
4 still has that up. That would be the Bortz  
5 report.

6 THE WITNESS: That would be fine with  
7 me.

8 MR. OLANIRAN: Do you have that up?  
9 Thanks a lot.

10 I think she was looking at B-20.

11 MR. GARRETT: 20.

12 MR. OLANIRAN: Thank you.

13 THE WITNESS: Okay. So this is a very  
14 -- I'm sorry.

15 BY MR. OLANIRAN:

16 Q. And you were talking about your  
17 concern about whether or not the constant sum  
18 question was -- measured marketplace value.

19 A. That's right.

20 Q. And you were about to discuss why.

21 A. So there are two bridges that would  
22 have to be crossed for the constant sum value  
23 allocation to reflect marketplace value. And  
24 the question and the Bortz methodology does not  
25 cross either of the bridges.

1           So let me start with the first one.

2       The first one is in the very first line of  
3       Question 4a: Now I would like you to estimate  
4       the relative value to your cable system of each  
5       category of programming, actually broadcasted  
6       by the stations I mentioned, et cetera.

7           Relative value is not necessarily  
8       marketplace value. The term "value" here is  
9       ambiguous. There are a variety of ways that  
10      people can interpret value, at least in this  
11      case in particular. How much money does the  
12      company make from each of these categories?  
13      What is the financial return?

14          And in my experience as a business  
15      school professor, when people talk about the  
16      value of an asset or the value of an  
17      investment, that is what they are talking  
18      about.

19          In contrast, marketplace value is  
20      usually interpreted as some measure of price or  
21      the outcome of an arms-length negotiation. And  
22      those are two very different things.

23          Q.     Now, do you have an illustration of  
24      how this could be different? Oh, these are  
25      different, I'm sorry, two different things.

1           A.     Well, they are different because one  
2     is a price and one is how much money it makes  
3     the company. If the amount of money it makes  
4     the company isn't greater than the price, I  
5     won't buy it.

6                     I think the second bridge is where I  
7     have a more effective illustration, and that is  
8     between value and the allocation task itself.  
9     Okay? And so the allocation is based on an  
10    instruction, what percentage of any of the  
11    fixed dollar amount would your system have  
12    spent on -- whatever. Okay.

13                    So it -- for this question to have  
14    construct validity, this question or the  
15    answers to this -- to this question have to  
16    correspond to value. How much I spend has to  
17    correspond to how much it is worth. And I have  
18    created a stylized example that demonstrates  
19    that that is not true.

20           Q.     And --

21           A.     And it is on page 26 and 27 of my  
22    direct testimony.

23           Q.     Okay.

24           A.     And so for purposes here, I'm going to  
25    assume that -- two things. One, that value is

1 financial return, how much money it makes the  
2 company.

3 And I have a simple example where a  
4 cable operator has to invest \$500 in two  
5 signals, each of which represents a unique  
6 category. One represents movies and one  
7 represents non-network news.

8 And I have to allocate \$500 according  
9 to those two categories. Okay?

10 So there are two tables on page 27.  
11 The first one is a payoff table.

12 Q. And what do you mean by payoff table?

13 A. A payoff table tells you what the  
14 payoff would be or the financial return from an  
15 investment of part of that \$500 in each of the  
16 two categories, movies or non-network news.

17 So, for example, if I invest \$300 in  
18 movies, I will get a financial return of  
19 \$100,500.

20 Q. You are still looking at the first  
21 table?

22 A. I am still looking at the payoff  
23 table.

24 Q. Thank you.

25 A. If I invest \$500 in non-network news,

1 I will get a financial return of \$13,825.

2 Q. Okay.

3 A. Okay? So I'm going to consider  
4 everything in increments of \$100.

5 The table below, the second table, is  
6 a scenario table which lists six possible  
7 scenarios or ways to allocate that \$500.  
8 0/500, 100/400, all the way down to 400/100,  
9 500/0.

10 Q. And the pairs that you have just read  
11 are possible combinations of -- possible  
12 combinations of your investment in movies and  
13 non-network news?

14 A. Right. It is the allocation of my  
15 \$500 across the two categories.

16 Q. Okay.

17 A. So then in the second set of columns,  
18 in this scenario table I have the corresponding  
19 payoffs that were taken from the payoff table  
20 above.

21 So, for example, in the third row, I  
22 have \$200 for movies and \$300 for network news.

23 If you go to the payoff table and see  
24 resources invested in movies, I have \$100,400,  
25 which is what -- which is the corresponding

1 entry in the scenario table.

2 And so total return, or total value,  
3 total money made from this resource allocation  
4 is maximized -- well, actually, you get that in  
5 the last column by adding up the two entries in  
6 the return from movies and return from  
7 non-network news column.

8 You add those two up and you get total  
9 return and you can see total return is  
10 maximized by an allocation of \$100 to movies,  
11 \$400 to network news.

12 However, that being the optimal and  
13 the rational business allocation, that is very  
14 different from the total return that you get,  
15 which is over -- which is about 90 percent  
16 movies, 10 percent non-network news.

17 If, going back to Bortz, if I'm  
18 responding to this questionnaire as somebody  
19 who is considering value as how much money it  
20 makes the station, then I would allocate \$100  
21 to movies and \$400 to network news.

22 But for the -- for the correspondence  
23 to be made between value and resource  
24 allocation, that would imply that I would have  
25 to spend 90 percent of the resources on movies,



1     which is very different than the optimal  
2     allocation, which only has 20 percent of the  
3     resources spent on movies.

4             So resource allocation does not  
5     correspond to value when value is thought of as  
6     how much money is being made.

7         Q.     So are you saying that Bortz are  
8     responding to think about financial return,  
9     when they hear the word "value" in that  
10    Question 4a that we were just looking at?

11        A.     Well, I would be amazed if some of  
12    them weren't, because in my experience that's  
13    the most common interpretation of the word  
14    "value" when it comes to a business asset,  
15    which these signals are.

16            But it doesn't have to be. There is a  
17    reasonable interpretation of the word "value"  
18    in that question that leads to a conclusion  
19    that resource allocation does not represent  
20    that term value, that interpretation of value.

21        Q.     Could there be other interpretations  
22    of value?

23        A.     Well, you know, I -- I'm not sure  
24    exactly what they are. I mean, you know,  
25    somebody could maybe be guessing as to what the

1 price would be, the marketplace value, or the  
2 result of an arm's-length negotiation might be,  
3 but I would be surprised.

4 Well, let me put it this way. I will  
5 be conservative. I will be surprised if nobody  
6 read the word "value" in that question as  
7 referring to how much money would be made by  
8 the investment.

9 JUDGE STRICKLER: You are saying the  
10 question is inherently ambiguous because there  
11 is no clarity in that regard as to the  
12 distinction between marginal value and total  
13 value?

14 THE WITNESS: Well, I haven't even  
15 talked about marginal value. I'm talking about  
16 increments. I am not looking at marginal yet.

17 Incremental is related to marginal,  
18 but I'm saying the question is ambiguous in  
19 that it -- in that it doesn't define value.

20 I'm also saying that the assumption  
21 that -- that any definition of value is related  
22 to resource allocation, unless that definition  
23 of value is how much I'm going to allocate my  
24 resources to, is incorrect.

25 BY MR. OLANIRAN:

1 Q. And so let's turn to the second major  
2 reason that you believe the Bortz measures fall  
3 short of the mark with regard to -- you spoke  
4 about the complexity of the money question, I  
5 think you said.

6 A. Yes.

7 Q. And would you please elaborate on what  
8 you mean by the complexity of the question?

9 A. Well, I think the mental model or the  
10 mental process that a respondent has to go to  
11 to answer that allocation question in an  
12 appropriate way is extremely complex and  
13 difficult. And that's aside from whatever the  
14 definition of value is.

15 So there's actually, in my direct  
16 testimony, there is an 11-step process that is  
17 outlined.

18 Q. Look at page 29, I think.

19 A. Sounds about right. Okay. So when I  
20 first studied the 2004-2005 Bortz surveys and I  
21 wanted to decide what was -- or examine what a  
22 respondent had to do to actually allocate those  
23 resources, regardless of what that allocation  
24 meant, regardless of whether it related to  
25 value or not, this was the 11 -- this was the

1 11 steps I came up with.

2 Now, the revised Bortz survey, these  
3 11 steps are somewhat different, but they are  
4 still a little -- they are still similar in  
5 characteristic.

6 So, for example, the first three  
7 steps, recall the stations carried by the cable  
8 system, recall all types of programming  
9 offered, mentally separating out programming  
10 from network programming, and remembering about  
11 Fox, this is all for the purpose of identifying  
12 the programming that is compensable or that I  
13 understand to be compensable. Okay?

14 Then 4 is organizing them into  
15 categories.

16 5 is no longer necessary because of  
17 the removal of the subscriber acquisition and  
18 retention phrase from the question. 6 is  
19 simply the accounting of costs.

20 But 7 is really an extremely important  
21 step. 7, in conjunction with -- can we scroll  
22 back up, please -- so 4 and 7, organizing the  
23 programming on stations into program categories  
24 and 7 is mapping the unit of acquisition to the  
25 categories of programming offered.

1           And I have a demonstrative that helps  
2           illustrate the complexity of doing 4 and 7.

3           Q.     Okay. Let's go to the first slide,  
4           please. And can you please describe the  
5           demonstrative?

6           A.     Yeah, happy to.

7           So this example is assuming that a  
8           cable system has two signals and has allocated  
9           the program on those two signals into four --  
10          into six categories. And this is what a  
11          respondent has to do in order to be able to  
12          successfully answer the question.

13          The respondent makes decisions with  
14          respect to, and has as units of their analysis,  
15          the things on the left-hand side of this map.

16          Q.     And what are those -- sorry to  
17          interrupt you. What are those things?

18          A.     The signals on the component programs,  
19          the compensable component program.

20          Q.     Thank you.

21          A.     What Bortz is asking them is about  
22          things on the right. And so in order for the  
23          respondent to be able to effectively allocate  
24          resources in a manner consistent with the Bortz  
25          request, they have to go through this map in

1 realtime on a telephone survey.

2 And this is for a simple case. This  
3 is for a case where there are two signals. And  
4 I want to start with this as an illustration.

5 So if we go to the next slide, this is  
6 what happens if we go to four signals. We have  
7 a spider web, a very complex spider web.

8 Q. Could you please explain what's going  
9 on with this spider web? You have four signals  
10 and --

11 A. Four signals, each with ten programs.

12 Q. Okay.

13 A. And the respondent in coming up with  
14 the resource allocation across categories has  
15 to map what's in those signals to the six  
16 categories on the right, and this, it looks  
17 like either a spider web or something out of a  
18 Star Trek laser fight.

19 Q. And the lasers you are referring to --

20 A. Are the links between the programs  
21 within signals, nested within signal on the  
22 category.

23 Q. And those are the arrows leading from  
24 each program being mapped to a particular  
25 category as required by the surveys; is that

1 correct?

2 A. Right. And so -- but we're still even  
3 not done. We're not done because what the  
4 respondent then has to do, once he or she does  
5 this -- and I remind you, in the Bortz survey  
6 and the Horowitz survey he or she is doing this  
7 on the telephone in realtime -- what the  
8 respondent has to do is then aggregate within  
9 each category.

10 So, in other words, let me try to give  
11 you an example that may bring this to life a  
12 little bit more.

13 My wife and I tend to go shopping at a  
14 mall in New Jersey called the Garden State  
15 Mall. And particularly she likes Nordstrom's  
16 in that mall. So over the years I have bought  
17 a lot of neckties in that mall.

18 So what Bortz is asking a respondent  
19 to do is akin to asking me how much did I pay  
20 for the blue that's in my neckties that I  
21 bought in the Garden State Mall in that  
22 Nordstrom's, where going to the Nordstrom's and  
23 the Garden State Mall is like separating the  
24 compensable from the non-compensable  
25 programming.

1                   So I have a lot of neckties that I  
2                   didn't buy there. I bought some at Brooks  
3                   Brothers in Manhattan, or wherever. Okay? And  
4                   then the blue, aggregating the blue is like  
5                   each of these spokes in the spider web.

6                   And so that's the kind of task that  
7                   Bortz is really asking its respondents to  
8                   perform. And I just think that is pretty hard.

9           Q.       I am wearing a necktie with three  
10           different types of blues. I don't know what  
11           that means.

12          A.       Yeah, I know. If I had thought in  
13           advance, I would have brought a multi-colored  
14           tie to better illustrate. But this one would  
15           be easy. It's all blue.

16          Q.       But going back to, again, staying with  
17           the complexity of these problems, do you have  
18           -- do you understand that there are certain  
19           types of broadcast signals on which all of the  
20           programming on those broadcast signals are  
21           compensable, such as the programs on Fox, for  
22           example?

23          A.       Okay.

24          Q.       Are you aware?

25          A.       So then if that's the case, that's



1     like incorporating a solid blue tie. That  
2     makes my task just a tiny bit easier because I  
3     don't have to worry about whether any of my  
4     solid blue ties were bought at Nordstrom's or  
5     Brooks Brothers.

6         Q.     Well, actually, I was asking a  
7     different question. On Fox broadcast stations,  
8     all of the programs are compensable.

9         A.     I see.

10        Q.     Yes.

11        A.     All right. So I didn't, I'm sorry, I  
12     did not understand your question. So this  
13     spider web then becomes infinitely more  
14     complex.

15                So let's say if a Fox program is on  
16     average an hour and my guess is that they are  
17     not, that they are probably on average shorter,  
18     if not almost all shorter, then there would be  
19     24 instead of ten elements in a signal A -- if  
20     signal A was Fox, then it wouldn't stop at  
21     program 10. It would stop at program 24 or, if  
22     all the programs were half hours, program 48.

23                And just making this an -- it makes it  
24     an impossible task to navigate a spider web  
25     that is that large.

1           Q.     Would it be acceptable if the  
2 respondents were familiar with what they have  
3 been asked to do?

4           A.     But they are not. That's the point.  
5 The respondents make decisions and live all day  
6 on the left-hand side of the spider web. They  
7 are asked to make aggregate judgments on the  
8 right-hand side. So they are not familiar with  
9 the kind of judgment.

10                   If the questions asked about programs  
11 or specific signals or even, as the Canadian  
12 Claimant study does, categories or programs  
13 within signal, that might be a little bit  
14 easier.

15                   But this is just impossible because  
16 there's the aggregation element. There is the  
17 separation, the transmission through the spider  
18 web, and then the aggregation on the right-hand  
19 side.

20                   And this is a very, very unfamiliar  
21 judgment to the respondents. I have not read  
22 anything in the record or in the rebuttal  
23 testimonies to me that talked about this being  
24 a judgment that people make.

25                   I have read testimony that said that,

1     yes, people make judgments about categories,  
2     but not in this manner. Not in this manner.

3         Q.     Okay.

4         A.     There is an example that I use with my  
5     students that I think might be very  
6     illustrative.

7         Q.     Sure.

8         A.     So if I were to stand up and ask you  
9     how tall I am, you probably would be pretty  
10    close. I am about 5-10. So you would probably  
11    be pretty close. You would be within an inch,  
12    inch and a half, something like that.

13               But if I stood up and asked you how  
14    long my leg was, that would be a pretty hard  
15    judgment to make. All right? Because it is  
16    not something you have ever done before or you  
17    are not used to and it doesn't happen very  
18    often.

19               And things that are less familiar are  
20    -- the judgments are less valid and less  
21    reliable. It gets even worse when you have to  
22    aggregate, as you have to on the right-hand  
23    side of this picture.

24               So if I extend that example, if I  
25    extend that task to the following: If I stand

1 up -- and I do this in class all the time, and  
2 it never fails to work -- I stand up. I ask  
3 students to write down the length of -- or the  
4 distance from the floor to my hip, from my hip  
5 to my lower armpit, from my armpit to where my  
6 chin projects, from my chin to the top of my  
7 head.

8 I ask them to write down those five  
9 elements. And then I ask them how tall I am.  
10 And the last thing I ask them to do is to add  
11 up those five elements.

12 You know, from a lot of my -- the  
13 responses my students have given, I should have  
14 had a professional basketball career. It is  
15 not unusual for me to be eight feet tall when  
16 you add them up.

17 It is also -- it is less common but it  
18 is not rare for me to be below five feet also.  
19 All right? So aggregation of unfamiliar  
20 judgments creates a huge problem in the  
21 validity. And that's what's going on here.

22 Q. Okay. I want to ask, is there a  
23 general theory as to how survey respondents  
24 answer complex questions?

25 A. Yes, it's called satisficing.

1 Q. And what is that?

2 A. It is well established that survey  
3 respondents in general are not willing to put  
4 in the enormous work that would often be  
5 required in very difficult -- to answer very  
6 difficult questions.

7 You can imagine, you know, when you  
8 get a telephone survey at home, if the  
9 questions aren't simple, you are out of there.

10 So what survey respondents do -- and  
11 it gets worse the more complicated the question  
12 is -- is they take shortcuts, sometimes called  
13 heuristics, in order to create a defensible way  
14 to answer any given question.

15 The more complicated the question, the  
16 more likely they are to use heuristics and  
17 shortcuts. And shortcuts and heuristics are  
18 known to be notoriously unreliable ways of  
19 making judgments.

20 And the Princeton psychologist, Daniel  
21 Kahneman, won a Nobel Prize largely for showing  
22 that, that that's what people do and they often  
23 make suboptimal decisions because of that.

24 Q. Okay. Now, you implied earlier that  
25 the complexity -- the complexity -- the

1 complexity is compounded by the fact that this  
2 survey is done by telephone.

3 Could you please elaborate on that?

4 A. Yes. As complicated as this is, doing  
5 it over a telephone makes it worse. And there  
6 are two reasons or there are at least two  
7 reasons or there are two outstanding reasons.

8 Number 1 is respondents are less  
9 engaged over a telephone. It is much easier to  
10 hang up on someone than it is to walk away from  
11 them when you are having a face-to-face  
12 exchange of questions and answers. That's  
13 Number 1.

14 And, Number 2, if you do it  
15 face-to-face, and if this interview were  
16 conducted face-to-face, or even on-line, the  
17 respondents would have in front of them or  
18 could have in front of them the signals, a list  
19 of the signals that they had to deal with, and  
20 the list of the categories that they had to  
21 answer about, instead of going back and forth,  
22 back and forth.

23 The visual aid would help structure  
24 thinking a little bit. I am not sure the  
25 survey would be much better, but the problems

1 with the study are exacerbated by the fact that  
2 it is done over the telephone.

3 JUDGE STRICKLER: Professor, does the  
4 quality of an answer that is based on  
5 heuristics being employed by the respondent  
6 vary depending on the expertise of the person  
7 who is responding, in other words, people with  
8 better information make better decisions based  
9 on heuristics than people from the -- being  
10 asked questions from the common population?

11 THE WITNESS: I am glad you asked that  
12 and the answer is no. Okay? And if I may, I  
13 will tell you about a couple of studies that  
14 are in the literature, or maybe if I do one and  
15 you tell me if you want to hear the second.

16 There was a study made -- one of the  
17 things that scientists do, or social  
18 scientists, psychologists in particular, is  
19 they conduct a lot of experiments and they  
20 choose a sample size.

21 Psychologists are pretty educated  
22 people. We're talking about academic  
23 psychologists, Ph.D. level psychologists.

24 They are pretty educated on how to  
25 choose a sample size, well, on -- on the

1 methods for deciding what an appropriate sample  
2 size is, but those methods involve statistical  
3 calculations that are too hard for them to do  
4 on the fly. They are not too hard for them to  
5 do, but they can be done on the fly.

6 And one of the things that has been  
7 traditionally found is when you examine the  
8 sample sizes that Ph.D. psychologists -- and  
9 this was done on the Stanford psychology  
10 faculty, so that's a pretty good set of Ph.D.  
11 psychologists, I would presume -- that their  
12 sample sizes were traditionally -- were  
13 consistently too small relative to the optimal.

14 And they were using the heuristic of I  
15 will use as my sample what's available in my  
16 classroom, something like that. So that's one  
17 study.

18 There is another study on surgeons.  
19 Should I describe it? Okay. There is another  
20 study on surgeons where a surgeon is asked  
21 based on the mortality rate of patients that  
22 are admitted into their hospital.

23 So there are various different types  
24 of surgeons. There are plastic surgeons.  
25 There are neurosurgeons. There are cancer



1 surgeons, et cetera. And the study found that  
2 the mortality rate estimates given by the  
3 surgeons varied greatly depending on the  
4 specialty.

5 So each specialty uses a different  
6 heuristic. So how do you define expertise in  
7 that sense? They are all surgeons. Right? So  
8 expertise would have to be a more uniformly  
9 consistent construct.

10 So those are two studies that come to  
11 mind.

12 JUDGE STRICKLER: Thank you.

13 BY MR. OLANIRAN:

14 Q. Given your experience as a survey  
15 researcher and given your understanding of the  
16 objective of this proceeding, are there better  
17 approaches to measuring relative market value  
18 of programming -- of the programming at issue  
19 in this proceeding?

20 A. Well, I'm a survey researcher, but I'm  
21 more -- I'm also a social scientist. And I  
22 don't believe that all I have is a hammer and  
23 every problem is a nail.

24 So I think I have studied enough  
25 economics and psychology to believe in the

1 dictum that actions speak louder than words.  
2 And economists have their theory of revealed  
3 preference and their principles of revealed  
4 preference.

5 So I think you can get a lot more  
6 reliable and valid information many times on  
7 what people do more than what they say.

8 MR. LAANE: I just -- I am not  
9 objecting yet. I just want to make sure we  
10 don't get into areas beyond what's in his  
11 written testimony, because he has a couple  
12 sentences where he talks about alternatives but  
13 he goes no further than that.

14 JUDGE BARNETT: So you are not  
15 objecting. You are just warning?

16 MR. LAANE: That's right.

17 THE WITNESS: He is just warning I  
18 should watch what I say.

19 (Laughter.)

20 JUDGE BARNETT: Go ahead, Mr.  
21 Olaniran. I don't think warning is a trial  
22 technique that I'm aware of.

23 MR. OLANIRAN: I also wanted to sort  
24 of bring to your attention, it's 11:55. And I  
25 have about another half an hour. If that's

1     okay, I will gladly continue, or --

2                 JUDGE BARNETT:  Is this a good  
3     breaking point?

4                 MR. OLANIRAN:  Yes.

5                 JUDGE BARNETT:  Okay.  Then why don't  
6     we take our break.  We will be at recess until  
7     12:55.

8                 MR. OLANIRAN:  Thank you, Your Honor.

9                 (Whereupon, at 11:56 a.m., a lunch recess was  
10    taken.)

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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 JUDGE BARNETT: Please be seated.

4 Mr. Garrett?

5 MR. GARRETT: I do have a housekeeping  
6 matter for this afternoon, Your Honor.

7 JUDGE BARNETT: All right.

8 MR. GARRETT: We request that we be  
9 given the opportunity to mark portions of this  
10 morning's discussion concerning Ms. Berlin as  
11 restricted material. We would be happy to try  
12 to limit it to as little as possible, but  
13 before this all goes out over the Internet or  
14 whatever, we'd like the opportunity to review  
15 the statements and decide which materials  
16 should be considered restricted.

17 JUDGE BARNETT: That's acceptable.  
18 We're trying to avoid this after-the-fact  
19 editing of transcripts, but under these  
20 circumstances, I think it's probably  
21 appropriate to do so.

22 We are not uploading the transcripts  
23 at this point. We've decided to wait until the  
24 end of the proceedings. So you may do that.

25 I suppose the best way is to

1 communicate with the court reporter, the court  
2 reporter will contact us to get approval, and  
3 we'll go from there.

4 MR. GARRETT: That's fine, Your Honor,  
5 we will keep it to a minimum. I promise.

6 JUDGE BARNETT: Thank you. Thank you  
7 very much.

8 Mr. Olaniran?

9 MR. OLANIRAN: Yes, Your Honor.

10 BY MR. OLANIRAN:

11 Q. Dr. Steckel, I want to now turn to  
12 your written rebuttal testimony. And that  
13 would be Exhibit 6015, correct?

14 A. Correct.

15 Q. Now, at a very high level, what were  
16 you asked to do for purposes of your written  
17 rebuttal testimony?

18 A. As everybody knows, the Bortz survey  
19 was updated between '04-'05 and 2010 to 2013.  
20 I was asked to render an opinion as to whether  
21 the newer version of the Bortz survey  
22 alleviated my concerns about the earlier  
23 version of the Bortz survey. I was further  
24 asked to examine Dr. Nancy Mathiowetz's  
25 testimony and see if that changed my views at

1 all.

2 And, finally, I was asked to look at  
3 the survey submitted by the Canadian Claimants  
4 to see if that made any difference as to how I  
5 felt about the Bortz survey.

6 Q. Did you also have an opportunity to  
7 review the rebuttal testimony of other  
8 witnesses, in particular the ones that address  
9 some of your testimony?

10 A. I did. But I didn't do that before  
11 this September 15th, 2017.

12 Q. Let's first start -- discuss your  
13 analysis of whether the changes to the Bortz  
14 survey submitted for the -- for this proceeding  
15 alleviate your concerns about -- about the  
16 survey. And having just gone through your  
17 opinion about the survey itself, I just want to  
18 limit the discussion to the changes that were  
19 made and your opinions about those changes.

20 And, again, just to make the record  
21 clear, the discussion we just had with respect  
22 to the Bortz survey, you were addressing the  
23 2010 through 2013 Bortz survey, correct?

24 A. Correct.

25 Q. And also the -- and it's the 2010

1 through 2013 questionnaire that's revised from  
2 '04-'05 questionnaire, correct, for Bortz?

3 A. That's my understanding.

4 Q. And it's, in fact, the '04-'05 Bortz  
5 questionnaire that was the basis from which the  
6 Horowitz -- Mr. Horowitz started his 2010  
7 through '13 survey, correct?

8 A. That's what I understand to be the  
9 case.

10 Q. Okay. And the discussion we're about  
11 to have now, again, is about the improvement  
12 between '04-'05 and 2010-'13 of the Bortz  
13 survey that's being presented in this  
14 proceeding?

15 A. All right.

16 Q. Okay. And what changes reflected in  
17 the 2010 through '13 Bortz survey questionnaire  
18 did you evaluate?

19 A. Well, I think we -- I think I have a  
20 demonstrative that lists them.

21 Q. Can we have that up? There we go.  
22 And could you walk us through the  
23 changes that you evaluated?

24 A. Certainly. So there were six bullet  
25 points on this slide, on this demonstrative, so

1 I'll start with the first one, the  
2 identification and inclusion of compensable  
3 programming on WGN. And that's certainly a  
4 step in the right direction, but as I  
5 understand, this step was only included on --  
6 for cable systems that -- for which the only  
7 distantly transmitted signal was the WGN  
8 signal. And that was fewer than half of the  
9 signals that incorporated WGN.

10 So a step in the right direction, but  
11 still a drop in the bucket, perhaps.

12 Q. What about reducing large number of  
13 distant signals that Bortz did?

14 A. Well, the new version of the Bortz  
15 study capped it at eight, the number of distant  
16 signals. Before lunch, I presented a  
17 demonstrative that showed how complicated a  
18 spider web would ensue when there were only  
19 four.

20 So capping it at eight, I don't see as  
21 a meaningful improvement at all. It's still  
22 going to be complicated.

23 Q. What about elimination of sports  
24 programming questions on some questionnaires?

25 A. Well, as I understand and recall, that



1 was done just for signals that did not have any  
2 sports transmissions. And I suppose that's a  
3 small step in the right direction as well.

4 Q. And what about with respect to the  
5 better coverage through stratified sampling?

6 A. That may be true, but it has nothing  
7 to do with what Bortz did. It has to do with  
8 the consolidation of the industry. The  
9 sampling methods were the same as I understand  
10 them in '04-'05 and 2010 to '13.

11 Q. And what is your view with regard to  
12 the changing survey's in -- the changing of the  
13 survey's introductory questions?

14 A. If it's all right with you,  
15 Mr. Olaniran, I'd rather save that to last.

16 Q. Okay.

17 A. I'd rather do the last bullet point  
18 before that.

19 Q. Okay. Then let's move to removing the  
20 phrase "attracting and retaining subscribers"  
21 from the constant sum question.

22 A. I'm not sure what impact that would  
23 have and why that was done. After all, value  
24 is derived from the attraction and retaining of  
25 subscribers. Even beyond subscription fees,

1 even things such as advertising fees are  
2 dependent on a cable system's ability to  
3 attract and retain subscribers.

4 So I don't know what other value --  
5 where else value comes from, at least in a  
6 primitive sense, than attracting and retaining  
7 subscribers. So I'm not sure what good that  
8 would do.

9 Q. Now, with respect to the changes made  
10 to the introductory questions.

11 A. Yeah, that's a very interesting one  
12 because I know Bortz contends -- and, you know,  
13 Horowitz put in warm-up questions too to get  
14 respondents in an appropriate mood to answer  
15 questions. And I understand that to be Bortz's  
16 purpose too.

17 But, actually, these introductory  
18 questions provide strong evidence of the lack  
19 of construct validity for the constant sum  
20 money question.

21 Q. And what do you mean by that?

22 A. Well, I have an analysis that was done  
23 in my rebuttal report, Exhibit 200 -- no, I'm  
24 sorry, Exhibit 6015, pages -- or what page was  
25 it on, I'm sorry?

1 Q. That would be page, I think, 19?

2 A. Yes, it's on page 19. But before we  
3 look at the table on page 19, I would like to  
4 look at the questionnaire again.

5 Q. Okay. Can you bring up the B-20 on  
6 Exhibit 1001?

7 And do you want to start with Question  
8 2?

9 A. 3.

10 Q. Question 3, I'm sorry.

11 A. So, Question 3, which is offered as a  
12 warm-up question, asks what is the cost ranking  
13 for the 2013 or for the year's programming on  
14 the stations listed. So it asks to rank these  
15 in terms of how much was paid.

16 So if we go to Question 4, Question 4  
17 is what percentage of a fixed dollar amount  
18 would your system have spent? To me those  
19 sound like the same question.

20 What was the cost and how much did you  
21 spend or would you have spent? So if those are  
22 the same question, then the information should  
23 be very closely related. And the information  
24 is related but not as strongly as it should be.

25 If we go back to Question 3, you can

1 see at the bottom that the respondent is  
2 supposed to give the ranks, what is the highest  
3 cost, second highest cost, third, et cetera,  
4 going down to sixth. If you go down to four  
5 now, the only difference is that you're  
6 supposed to allocate 100 points. It's a  
7 constant sum. But those allocations should be  
8 in the same order as the ranking from Question  
9 3 because they're essentially asking the same  
10 question and the only difference is one is what  
11 we call an ordinal scale and one is what we  
12 call a ratio scale.

13 So there's more quantitative  
14 information, but the order of the -- the order  
15 -- the rank order of the alternatives in  
16 Question 4a should be the same, exactly the  
17 same, as in Question 3. And so what I decided  
18 to do or what I set out to do was explore the  
19 extent to which that was actually true.

20 Q. And --

21 A. And so now we can go back to page 19  
22 of 6015.

23 JUDGE STRICKLER: I have a question  
24 for you, sir, before you get to that, with  
25 regard to your testimony that you think

1 Questions 3 and 4 are asking for the same  
2 information.

3           Would you not also consider the  
4 possibility that Question 3 could be construed  
5 as to what the relative cost is, irrespective  
6 of whether you paid the cost? It's a pricing  
7 type of question, and Question 4 seems to  
8 clearly say -- ask you to determine how much  
9 you would have -- you, in fact, would spend,  
10 knowing the cost.

11           In other words, I know that -- I can  
12 tell you the price of a Tesla, but -- and I can  
13 also tell you whether I would pay for it or  
14 not, and those are two separate questions,  
15 right?

16           THE WITNESS: Well, yes, but I don't  
17 think this question is the same as your Tesla  
18 example. Can we go back to the questions?

19           Because as I understand, people only  
20 ranked or provided the constant sum information  
21 on things they actually did buy.

22           JUDGE STRICKLER: I agree with you.  
23 That's Question 4. But Question -- are you  
24 sure that Question 3 or is it your testimony  
25 that Question 3 is also asking them about the

1     expense of categories that they, in fact, did  
2     purchase?

3             THE WITNESS: Well, you know, that's a  
4     good point. I understand -- and I understand  
5     that. And --

6             JUDGE STRICKLER: Well, the question  
7     says --

8             THE WITNESS: Right.

9             JUDGE STRICKLER: -- "please rank  
10    these six categories in order of how expensive  
11    each would have been to your system."

12            THE WITNESS: Right. And Question 4  
13    says --

14            JUDGE STRICKLER: Question 4 is a  
15    constant sum regarding what you would, in fact,  
16    spend.

17            THE WITNESS: Well, you know, yeah,  
18    there's ambiguity throughout this  
19    questionnaire. But it's would your system have  
20    spent. It's the same language.

21            Maybe I'm missing your point.

22            JUDGE STRICKLER: Well, I don't know  
23    that you are because when you say there's  
24    ambiguity throughout, I'm noting another  
25    interpretation of a distinction between 3 and

1 4, rather than equating them, but I'm not  
2 disagreeing with you, in my question anyway,  
3 with regard to whether or not there's ambiguity  
4 there. I don't know if there's anything else  
5 you wanted to add or not.

6 THE WITNESS: Yeah, I think it's "cost  
7 would have been," "would you have spent." You  
8 know, there's ambiguity throughout. And it's  
9 an interesting wrinkle -- I'll be honest, I  
10 hadn't thought of it -- but the language is the  
11 same.

12 BY MR. OLANIRAN:

13 Q. Now, you were -- you made comparisons  
14 between Question 3 and Question 4. And I think  
15 you directed us to page 19 of your testimony.

16 A. I did direct you to page 19.

17 Q. Okay. Could you explain your analysis  
18 on page 19?

19 A. So what was done on page 19, the table  
20 on page 19 reflects the analysis of performing  
21 the rank correlations between the responses to  
22 Question 3 and Question 4 for each of the  
23 respondents that were provided to me, that were  
24 available.

25 Q. Could you please take -- let's take

1     2010, the 2010 row, and explain what those  
2     numbers mean.

3         A.     Right.  So if -- so 2010, I was  
4     provided with a spreadsheet of 163 respondents.  
5     And I examined, under at least my presumption,  
6     which Your Honor has posted -- you know, may  
7     have some wiggle room because of ambiguity in  
8     the question, but ambiguity infects the  
9     questionnaire anyway.  And if it's ambiguous,  
10    then it still lacks construct validity.

11                So, you know, ambiguity aside.  So  
12    let's say that there is no ambiguity.  This  
13    analysis would be the case if there is no  
14    ambiguity.  If there is ambiguity, then  
15    questions are ambiguous and are not reliable or  
16    valid in and of themselves.  So -- regardless.

17                So under the presumption that there  
18    should be perfect correlation between the rank  
19    order in Question 3 and the rank order in  
20    Question 4, well, the data in 2010 failed  
21    miserably.  Only 13 of the 163 respondents had  
22    perfect correlations.

23                One of them, one respondent had a  
24    correlation as low as .36.  Even if I didn't  
25    have a standard of perfect correlation, if the



1 standard was a correlation of .9, 64 of them  
2 failed that cutoff.

3 So one of the things that I think is  
4 clear -- and I make similar comments about  
5 2011, '12, and '13, so let me go to the table,  
6 the total table, the total line.

7 Out of 654 respondents across all  
8 years, about half of them had correlations less  
9 than .9. Some of the people and some in every  
10 year had correlations that were clearly  
11 relatively low and lower than you would expect,  
12 unless respondents were thinking entirely  
13 different things between Question 3 and  
14 Question 4, which is hard for me to imagine  
15 based on the language of the two questions.

16 Q. And just setting aside your  
17 reservations about surveys in general as used  
18 in this proceeding, do you have an opinion as  
19 to how the -- well, strike that.

20 Well, do any of the changes that were  
21 made to Bortz, the Bortz survey as reflected in  
22 the 2010 through '13, did they change your  
23 concerns about the Bortz surveys?

24 A. No.

25 Q. And why not?

1           A.     Well, two reasons. The two big  
2 reasons I gave this morning about why I don't  
3 think the Bortz survey is of any usefulness in  
4 this context. And one is lack of construct  
5 validity. And none of the changes address  
6 construct validity. And the spider web, the  
7 difficulty in responding.

8                     The spider web, coupled with the  
9 aggregation at the end, none of the changes  
10 impact that.

11          Q.     And so setting aside your reservations  
12 about surveys, as used in this proceeding, do  
13 you have an opinion as to the 2010-'13 Bortz  
14 survey versus the Horowitz -- the 2010 through  
15 '13 Horowitz surveys?

16          A.     Well, I do. But, as I said earlier, I  
17 don't think either of them are great. At least  
18 if you take those two big classes of problems,  
19 at least the Horowitz survey does something to  
20 help the respondents navigate through the  
21 spider web.

22                     It still has the construct validity  
23 issue, but the spider web is a little bit  
24 easier to navigate through because of the  
25 changes it made with constant reminding. The

1 constantly reminding the respondents of the  
2 stations and the issues -- and -- that they had  
3 to deal with and providing examples of the  
4 types of programming made things a little bit  
5 easier, but still not good.

6 Q. Now let's turn to your written  
7 rebuttal with respect to Dr. Mathiowetz's  
8 testimony. Now, what is your general  
9 understanding of Dr. Mathiowetz opinion of the  
10 2010 through '13 Bortz survey?

11 A. Well, I think she endorses it. She  
12 essentially gives it her seal of approval. And  
13 she endorses the changes that were made as  
14 things that could only help.

15 Q. Okay. And does her testimony give you  
16 confidence about the 2010 through '13 Bortz  
17 survey?

18 A. None at all.

19 Q. Why not?

20 A. Well, because the vast majority of her  
21 testimony is -- does not have an analytic base.

22 Q. What do you mean by that?

23 A. She quotes a lot of the opinions in  
24 prior proceedings and essentially generates the  
25 impression that because this was done in

1 earlier cases, it has to be correct. She does  
2 no independent analysis of her own. And the  
3 little literature that she refers to, she  
4 mischaracterizes or -- or cites in an  
5 incomplete fashion.

6 Q. And so you're aware that  
7 Dr. Mathiowetz also disagrees with some of your  
8 assertions in her -- in her testimony, right?

9 A. I think she disagrees with almost all  
10 of my assertions.

11 Q. Do you recall Dr. Mathiowetz asserting  
12 that the new introductory questions in the 2010  
13 through '13 Bortz survey questionnaire are  
14 useful primers for the money, the constant sum  
15 question?

16 A. I recall that she said that.

17 Q. And what is your response to that? I  
18 think you just talked a little bit about that.

19 A. Right. Well, first of all, it's not  
20 true based on the analysis I just presented.  
21 And, second, I have two words to -- to respond  
22 to that with: Spider web.

23 I mean, those questions do nothing to  
24 make the spider web easier to transverse.

25 Q. Dr. Mathiowetz also states that the

1 questions in the Bortz questionnaire are clear,  
2 precise, and unbiased.

3 Do you agree with that?

4 A. No, I don't.

5 Q. Why not?

6 A. Same two words: Spider web. How can  
7 anything that's so complicated be so clear?  
8 That's a rhetorical question. He looked like  
9 he was about to answer.

10 (Laughter.)

11 BY MR. OLANIRAN:

12 Q. I don't think that's allowed.  
13 Dr. Mathiowetz also disagrees with your opinion  
14 that the Bortz and Horowitz surveys do not  
15 address the relevant question of interest in  
16 this proceeding.

17 And what is your response to that?

18 A. You know, that's a question which --  
19 that's an opinion in which she simply quoted,  
20 as I recall, past opinions, as if they were  
21 gospel and written in stone. And I guess, you  
22 know, that's not -- as a scientist, I think she  
23 and I are trained not to do that.

24 We're trained always to be able to --  
25 to be able to always question the written state

1 of the art. Otherwise, if we don't do that, we  
2 make no progress.

3 She presented no independent analysis  
4 or justification that prevents me from  
5 believing that the two bridges that have to be  
6 crossed from the statutory requirement of  
7 relative marketplace value to the constant sum  
8 question, those two bridges that I talked about  
9 this morning, can be crossed. She presents no  
10 evidence other than what I like to say is  
11 sometimes because she says so.

12 Q. Okay. Can we pull up Exhibit 1007.

13 And look at pages -- paragraph 11,  
14 which carries over to -- paragraphs 11, 10 -- I  
15 guess paragraph 10 through 12. Could you take  
16 a look at those paragraphs?

17 A. And 12? I'm sorry. She even admits  
18 in the first sentence of 12, "based on the  
19 historical comments of." She presents nothing  
20 independent to support that.

21 Q. Are you referring to the sentence  
22 where she says "based on the historical  
23 comments of CRJ's, CARP, the Librarian, and the  
24 court of appeals --

25 A. Yes.

1           Q.     -- it appears that both the Bortz and  
2     Horowitz surveys, by focusing on the relative  
3     valuation placed on program categories by cable  
4     system operators are, in fact, addressing the  
5     relevant question of interest.

6           A.     And I just don't believe that's right.

7           Q.     Okay. Dr. Mathiowetz also states that  
8     the constant sum -- your criticism of the  
9     constant sum questions are unfounded. What's  
10    your response to that?

11          A.     Well, I -- as you've heard all morning  
12    and so far today, I have lots of criticisms of  
13    the constant sum question. But the fact that  
14    it's a constant sum question in general, while  
15    I -- you know, there are certain cases in which  
16    it's useful, it's just not useful here.

17                 The report in her testimony, as I  
18    remember, she points to historical testimony of  
19    a Professor Reid, a Mr. Axelrod, et cetera,  
20    that's 50 years old and does not address the  
21    use -- and none -- none of what she points to  
22    and none of the research she points to of  
23    Mr. Axelrod addressed the use of constant sum  
24    questions in a case like this.

25                 And, indeed, Mr. Axelrod -- and I will

1 give a specific citation -- on page 8 of the  
2 paper that he wrote that is in the record of  
3 prior proceedings does not recommend constant  
4 sum questions be used over the telephone.

5 Q. Now, I want to switch to the rebuttal  
6 testimony of Dr. Israel who testified on behalf  
7 of the Joint Sports Claimants.

8 Do you recall reading that?

9 A. I do.

10 Q. Okay. Can we pull up Exhibit 1004,  
11 please. And can we go to page 29, paragraph  
12 55.

13 Have you had a chance to review that?

14 A. If you'll give me a second.

15 Q. Sure.

16 A. Okay.

17 Q. And this paragraph 55 is where  
18 Dr. Israel disagrees with your assertion that  
19 cable executives would be unable to respond  
20 accurately to the Bortz survey because they  
21 don't make decisions about individual programs  
22 or the various program categories employed in  
23 this proceeding.

24 And -- do you see that?

25 A. Yes, I do.



1           Q.     And what is your response to his  
2     disagreement with that assertion?

3           A.     That I think he's -- I think he's  
4     wrong.

5           Q.     And why do you say that?

6           A.     And I think he -- this is another case  
7     where it's a "because I said so" type of  
8     opinion.

9                     And I want to point to paragraph 56  
10    where he, himself, says, "in my own work, I  
11    interact with both cable executives and content  
12    providers regularly. Their discussion about  
13    what certain networks are worth -- both how  
14    cable executives market them and how networks  
15    market themselves -- are all about breaking  
16    down the value of the underlying content."

17                    So even according to his own  
18    statement, the experience that he has, that  
19    he's pointing to, relates to cable network  
20    executives evaluating the left-hand side of the  
21    spider web. He says nothing about them  
22    continually making decisions and judgments  
23    about evaluating the right-hand side of the  
24    spider web, which is what the Bortz  
25    questionnaire is asking respondents to do.

1 JUDGE BARNETT: Mr. Dove?

2 MR. DOVE: Your Honor, nothing with  
3 regard to the testimony, but the exhibit we're  
4 on is Exhibit 1004. I believe it should be --  
5 that's one that was not admitted in these  
6 proceedings, and I believe he should be at  
7 1087, just for the record.

8 JUDGE BARNETT: Thank you, Mr. Dove.

9 MR. OLANIRAN: Thank you for the  
10 correction.

11 BY MR. OLANIRAN:

12 Q. Could you just review paragraphs 55  
13 and 56 of 1087 to make sure that there's no  
14 difference in the text that you just discussed  
15 versus what's -- what's in this, these two  
16 paragraphs of 1087?

17 A. No, that's what I just read.

18 Q. Thank you. And I forgot, you were in  
19 paragraph 56 and discussing Dr. Israel's own  
20 words.

21 A. Yeah. And his own words even say that  
22 the executives that he deals with are making  
23 decisions and judgments about the left-hand  
24 side of the spider web. But yet the Bortz  
25 questionnaire is asking people to make

1 judgments about the right-hand side of the  
2 spider web.

3 JUDGE STRICKLER: Isn't paragraph 56  
4 talking about the left- and the right-hand side  
5 but just only for one -- one row of the  
6 left-hand side at a time; in other words, if it  
7 was TBS or TNT executives, they would have to  
8 decide, or a regional sports network, an RSN,  
9 they would have to decide the value of  
10 different categories of programming, but you  
11 wouldn't have the web because you wouldn't have  
12 all the different connections that you've  
13 testified make things so confusing? You could  
14 be on the left-hand side and be an RSN, and  
15 then you say I have regional sports, I have --  
16 I think it's called filler programming in this  
17 testimony. So you are going across, but you're  
18 only going across one row on the left to cover  
19 everything in the column on the right?

20 THE WITNESS: I think what you're  
21 saying, and that would be one way to interpret  
22 it, but I guess I -- I think it's the same  
23 thing. If you look at it one category at a  
24 time, then if you look at the specific  
25 programs, then they map -- well, I suppose each

1 signal could have multiple programs that go  
2 into the same category. I suppose that's  
3 possible too. So --

4 JUDGE STRICKLER: And as -- as she's  
5 apparently testifying here --

6 THE WITNESS: He.

7 JUDGE STRICKLER: He, I'm sorry. I  
8 apologize. That these are -- that TBS has to  
9 look at all different types of categories,  
10 sports, syndicated shows, movies, whatever else  
11 they have on, local news, if that's there as  
12 well, so they do have to go to the right-hand  
13 column, but they don't have to do the mental  
14 gymnastics of doing it across all the different  
15 stations; they only have to do it with regard  
16 to TBS?

17 THE WITNESS: No, that's right.  
18 That's right.

19 JUDGE STRICKLER: Thank you.

20 BY MR. OLANIRAN:

21 Q. And also let's turn to paragraph --  
22 excuse me one second -- paragraphs 57 and 58 on  
23 page -- I think it's page 29 -- is that  
24 right -- of Exhibit 1087. Page 30, I'm sorry.

25 JUDGE STRICKLER: Which paragraph?

1 MR. OLANIRAN: Paragraphs 57 and 58 on  
2 Exhibit 1087. And that's page 30.

3 BY MR. OLANIRAN:

4 Q. Have you had a chance to review that?

5 A. Yes, but if you will give me a moment.

6 Q. Sure.

7 A. Yeah.

8 Q. And what is Dr. Israel's criticism in  
9 these two paragraphs with regards to your  
10 testimony?

11 A. Well, I'm not sure what his criticism  
12 is apart from the headline to -- under point 3  
13 where it says "Dr. Steckel's discussion of  
14 marginal versus total values is incorrect."

15 I think this is extremely  
16 disingenuous, in particular, since he puts the  
17 terms "marginal return" in quotes. That's not  
18 a phrase I used anywhere in my testimony. And  
19 he's quoting me as saying something I didn't  
20 say.

21 JUDGE STRICKLER: You used the phrase  
22 -- the word "incremental."

23 THE WITNESS: I used the word  
24 "incremental."

25 JUDGE STRICKLER: And you're

1 distinguishing that that from "marginal"?

2 THE WITNESS: But I also did not say  
3 value created by one more minute of  
4 programming. It's incremental per hundred  
5 dollars, per hundred dollar investment. That  
6 was my analysis. Right?

7 And I -- I want to point to the -- to  
8 the fact that he uses different language that I  
9 did and doesn't address my example at all,  
10 doesn't question my example at all or the  
11 model, the stylized example I presented this  
12 morning.

13 I did not look at value created by one  
14 more minute, and what he says I argue --  
15 Dr. Steckel argues that the Bortz survey  
16 captures only the marginal return of each  
17 category -- I think as is clear from my  
18 testimony this morning, I don't know what the  
19 Bortz survey captures.

20 So I certainly don't argue that it  
21 captures the marginal return, the value created  
22 by one more minute of programming. He has  
23 co-opted my report into his own language and  
24 his own view of what he wants it to read. And  
25 I think that's extremely disingenuous.

1 BY MR. OLANIRAN:

2 Q. Now let's move to the Canadian -- your  
3 views on the Canadian survey methodology.

4 What is your understanding of the  
5 objectives of the Canadian study?

6 A. The Canadian Claimants' survey, as I  
7 understand it, had two objectives: To find the  
8 relative -- to find the value of Canadian  
9 programming rebroadcast on distant signals and  
10 to find out the value or the relative -- the  
11 importance is the word they use -- the  
12 importance of the specific types of programming  
13 on very specific types of stations,  
14 super-stations, independent stations, et  
15 cetera.

16 Q. Okay. And what's your understanding  
17 of the survey methodology employed for the  
18 Canadian Claimants?

19 A. It was very similar to the Bortz and  
20 Horowitz surveys, as I understand it. There  
21 were a couple of differences. One of the  
22 differences is that it asks one signal at a  
23 time in contrast to Bortz, which asks for all  
24 the signals, which I think is a great  
25 improvement, consistent with the question that

1 Your Honor had asked a few minutes ago. If you  
2 look at it one at a time, it makes the spider  
3 web much less dense.

4 Q. And as between the Canadian study  
5 compared to the Bortz, what is your opinion?

6 A. Well, I think the Canadian study even  
7 goes farther than Horowitz in trying to  
8 simplify the spider web. It also has another  
9 improvement. Although the word "value" is  
10 ambiguous, it's at least consistent in the  
11 money question.

12 It asks for relative value, and then  
13 it asks the respondent to allocate 100 points  
14 according to value, not according to how much  
15 they would have spent. So at least there's a  
16 consistency improvement, although there's still  
17 ambiguity in the term, and it simplifies the  
18 task to the respondent by asking one signal at  
19 a time.

20 MR. OLANIRAN: I have no further  
21 questions, Your Honor. Thank you, Dr. Steckel.

22 THE WITNESS: Thank you, Mr. Olaniran.

23 JUDGE BARNETT: Thank you,  
24 Mr. Olaniran.

25 Additional cross-examination? Excuse



1 me, cross-examination.

2 MR. LAANE: Yes, Your Honor.

3 JUDGE BARNETT: Let's start with the  
4 first one.

5 CROSS-EXAMINATION

6 BY MR. LAANE:

7 Q. Good afternoon, Dr. Steckel.

8 A. Good afternoon.

9 Q. I'm Sean Laane. I'm here representing  
10 the Joint Sports Claimants.

11 A. Pleasure to meet you.

12 Q. You spent most of your time studying  
13 marketing strategy and marketing research,  
14 right?

15 A. Most of my time over the last 30 some  
16 odd years, yes.

17 Q. Okay. With a focus on research on  
18 consumers, right?

19 A. No, actually. If you see a lot of my  
20 work, if you take a look at my CV, a lot of it  
21 is on how managers make decisions.

22 Q. You said at page 2 in your written  
23 direct testimony that you have been involved in  
24 hundreds of consumer surveys, right?

25 A. That's right.

1 Q. So would you say the majority of your  
2 survey work has been on consumer surveys?

3 A. I think that's fair.

4 Q. And have you ever designed, conducted,  
5 or supervised a survey of executives in the  
6 cable television industry?

7 A. No.

8 Q. Okay. Have you ever worked in the  
9 cable television industry?

10 A. No, not that I recall.

11 Q. I thought that would have been easy to  
12 remember, but --

13 A. Well, I interpret -- I interpret the  
14 question have I ever done any work for an  
15 agency --

16 Q. I see.

17 A. -- in the cable television industry.

18 Q. I see. But you've neither worked for  
19 a CSO, nor done consulting work for one that  
20 you can recall?

21 A. That's correct.

22 Q. And none of the research publications  
23 or presentations listed in your CV relates to  
24 the cable television industry, correct?

25 A. I believe that's correct.

1 Q. Okay. And you don't hold yourself out  
2 as an expert on how cable system executives  
3 make decisions, do you?

4 A. That is correct.

5 Q. Okay. And in terms of your expertise,  
6 you're not an economist, right?

7 A. I don't have a degree in economics. I  
8 have a working knowledge of some elementary  
9 economic principles.

10 Q. But you've testified in courts under  
11 oath that you weren't trained as an economist  
12 and that you're not an economist, right?

13 A. That's correct.

14 Q. Okay. Now, you told us there were  
15 maybe 25 cases you remembered being involved in  
16 and you were lumping together trial testimony  
17 and things like declarations in support of  
18 summary judgment in that number; is that right?

19 A. Where my declaration was cited as part  
20 of the summary judgment or denial of class  
21 certification.

22 Q. Okay. Was most of that in the motions  
23 capacity, not in the trial capacity, most of  
24 those 25?

25 A. No, I don't believe so.

1           Q.     Okay.  Have there been occasions when  
2     you have presented a survey to the courts and  
3     the courts have found that your methodology  
4     didn't pass muster?

5           A.     Yes, there have been.

6           Q.     Okay.  And you talked about doing  
7     valuation surveys.  Was one of those a  
8     valuation survey you did in a case out in  
9     California known as Brown, also called In re  
10    tobacco cases?

11          A.     Yes.

12          Q.     Okay.  And the trial court in that  
13    case rejected a survey you had done for a  
14    variety of reasons, right?

15          A.     That's correct.

16          Q.     Okay.  Including that your method of  
17    selecting participants was flawed?

18          A.     I don't recall that being one of the  
19    reasons, but I do remember the trial court  
20    piling on.

21          Q.     Okay.  We can look at it, if you want.  
22    You accept my representation it says that in  
23    the opinion?

24          A.     I have no -- I have no reason to doubt  
25    your representation.

1 Q. Okay. And the court found your survey  
2 instructions were difficult to understand?

3 A. I have no reason to doubt that  
4 representation either.

5 Q. Okay. And the court found the  
6 questions were repetitive and complex?

7 A. That's what the court found, although  
8 I disagree with the court on at least that one.

9 Q. Okay. And the court concluded that  
10 your survey produced nonsensical results?

11 A. That was the court's conclusion.

12 Q. Okay. And in upholding the trial  
13 court, the California Court of Appeals quoted  
14 the trial judge as saying, "rarely have I ever  
15 seen something that was subject to such a  
16 multifaceted attack. It just demolished this  
17 survey." Correct?

18 A. It was not one of my best days.

19 Q. Okay.

20 A. At least when I read the reports and  
21 the opinions was not one of my best days. I --  
22 I do disagree with most of the criticisms, but  
23 so it goes.

24 Q. All right. Your CV lists Hershey as a  
25 past client. And you did a consumer confusion

1 survey in a case called Hershey versus  
2 Promotion in Motion, right?

3 A. Yes, that's correct.

4 Q. Okay. And in that case, did the court  
5 find "this court does not find Steckel's survey  
6 results persuasive; much of Steckel's criticism  
7 of other confusion surveys applies to his own"?

8 A. If the court said that, the court said  
9 that.

10 Q. Okay.

11 A. I will accept your representation that  
12 that's what the court said.

13 Q. All right. And your prior testimony  
14 also lists a case in Michigan called Visteon,  
15 and in that case, I guess the court found your  
16 survey was not relevant.

17 Do you recall that?

18 A. Not relevant because it was input to  
19 an economist's -- to an economist's analysis  
20 and the economist was Dauberted. Once the  
21 economist was Dauberted, my work was no longer  
22 relevant.

23 Q. Okay. But did the trial judge also  
24 note that even if it had been relevant, there  
25 would have been legitimate challenges to your

1 methodology?

2 A. I don't recall, but there are  
3 legitimate challenges to any methodology. No  
4 survey is perfect.

5 Q. Okay. And, in fact, you've written  
6 that, right, that any survey ever done could be  
7 criticized?

8 A. I'm sure that's true. Every survey,  
9 every scientific process is open to criticism.

10 Q. Okay.

11 A. Indeed, that's the lifeblood of our  
12 disciplines.

13 Q. Now, page 8 of your direct testimony,  
14 you say that in your view there were two  
15 research approaches that would be more useful,  
16 and one of the ones you listed is a survey of  
17 cable customers.

18 By cable customers, do you mean  
19 subscribers?

20 A. Yes.

21 Q. Okay. And you told us you have  
22 designed a lot of surveys over the years,  
23 right?

24 A. Yes.

25 Q. Did Program Suppliers ask you to

1 design a cable subscriber survey for this case?

2 A. No, they did not.

3 Q. Did you -- in light of your view a  
4 subscriber survey would be more useful, did you  
5 recommend that they do a subscriber survey?

6 A. I don't make recommendations to  
7 counsel of new projects.

8 Q. Okay.

9 A. That was not part of my assignment.

10 Q. Do you know if -- if anybody did a  
11 subscriber survey for the years 2010 through  
12 '13?

13 A. I do not know.

14 Q. Okay. And then you also say that  
15 analysis of market data would be more useful.  
16 But you don't set forth any market data in your  
17 testimony, right?

18 A. No, I don't.

19 Q. Okay. Now, when were you first  
20 retained in this case?

21 A. It has to be, oh, I don't know,  
22 somewhere two to three years ago.

23 Q. Okay. Do you know if you were  
24 retained before or after the Horowitz survey  
25 was fielded?



1 A. Yes, I do.

2 Q. And was it before or after?

3 A. It was after.

4 Q. Okay. Did you have any input  
5 whatsoever in the design or conduct of the  
6 Horowitz survey?

7 A. No.

8 Q. And after you were retained, one of  
9 the things you did was go back and review  
10 testimony from prior proceedings about the  
11 surveys, right?

12 A. Correct.

13 Q. Okay. Including the testimony of a  
14 Dr. Rubin?

15 A. I believe so.

16 Q. Okay. And in this case, the basic  
17 criticisms you're offering are things that  
18 Dr. Rubin and others had raised in prior  
19 proceedings, right?

20 A. I don't recall. It's possible. Some  
21 of them are. I don't know if Dr. Rubin talked  
22 about a spider web.

23 Q. Well, he certainly talked about the  
24 argument that he felt the question was too  
25 complex for cable operators to answer, right?

1           A.     Right. And the spider web is part of  
2     an illustration.

3           Q.     But he said too complex due to the  
4     numbers of different programs and signals they  
5     might have to think about, right?

6           A.     I don't recall what he said.

7           Q.     Well, it's in the record and that will  
8     reflect it. And Dr. Rubin also raised the same  
9     criticism you raised about doing surveys over  
10    the telephone, right?

11          A.     I don't recall.

12          Q.     No reason to doubt it if I represent  
13    to you that's in his testimony?

14          A.     No reason to doubt it.

15          Q.     Okay. Now, all of your sort of  
16    general criticisms of the Bortz survey also  
17    apply to the Horowitz survey, right?

18          A.     That's right.

19          Q.     And --

20          A.     Although albeit one or two of them to  
21    a lesser degree.

22          Q.     Okay. But, I mean, even if we looked  
23    through the subject headings in your table of  
24    contents, most of them say the Bortz and  
25    Horowitz survey did this or that wrong, right?

1           A.     I believe my testimony was written --  
2     when I wrote it, I described it as the  
3     Bortz/Horowitz survey.

4           Q.     Okay. And I noticed when you were  
5     talking about improvements to Horowitz this  
6     morning, more than once you would either say,  
7     you know, with scare quotes, "improvements," or  
8     you would call them alleged improvements.

9                     So does that mean that you think  
10    Horowitz's changes did not really improve his  
11    survey?

12          A.     No. I -- it means, I think, that the  
13    improvements that the -- that the  
14    "improvements" improved the survey but not  
15    enough to clear a bar where I would consider it  
16    to have reliability and validity.

17          Q.     Would it improve a survey to include  
18    examples in it that are wrong?

19          A.     You know, I -- if the examples are,  
20    indeed, wrong, then no, that would not -- that  
21    would not be an improvement.

22          Q.     Okay. And, in fact, that can bias a  
23    survey, right?

24          A.     Well, what -- bias has a very specific  
25    scientific meaning. What do you mean by bias?

1 Q. Could distort the respondents' results  
2 one way or another?

3 A. That's possible.

4 Q. Okay. And did you review the written  
5 rebuttal testimony of Mr. Trautman and  
6 Dr. Mathiowetz?

7 A. I did.

8 Q. Okay. And they identified a number of  
9 instances of examples used by Mr. Horowitz that  
10 were incorrect or misleading, didn't they?

11 A. That they believed were incorrect or  
12 misleading.

13 Q. Did you -- and you didn't do any  
14 analysis of that yourself, did you?

15 A. I did not do any independent  
16 verification as to whether they were indeed  
17 incorrect or misleading.

18 Q. Okay. But you would agree, for  
19 example, it would be inappropriate to use  
20 NASCAR as an example of other sports  
21 programming in the survey of a CSO whose  
22 distant signals didn't have any NASCAR  
23 broadcasts on them, right?

24 A. That's not what I meant. I certainly  
25 wouldn't do it that way, but it would certainly

1 be misleading to include examples of things  
2 that didn't belong in the category.

3 If they had NASCAR, would it be  
4 appropriate to include in the category? Maybe.  
5 I don't know. So it's a level of degree, not  
6 of kind. It's not a light switch.

7 Q. Well, you would agree it wouldn't be  
8 appropriate to use as an example programming  
9 that's not compensable in this proceeding,  
10 right?

11 A. Probably not, yes.

12 Q. Okay. And you'd agree it wouldn't be  
13 appropriate to use as an example programming  
14 that wasn't carried on a distant signal at all,  
15 right?

16 A. As an example for -- I think that's  
17 probably right as well.

18 Q. Okay. And you'd agree it wouldn't be  
19 appropriate to tell respondents a program was  
20 an example of Program Suppliers' programming if  
21 it was actually in a different category, right?

22 A. That's -- that's -- yeah, that would  
23 be pretty bad.

24 Q. Now, your written direct testimony --  
25 and you might just want to look at it -- at

1 page 25, you discuss issues that you say may  
2 arise when a particular individual is the  
3 respondent for more than one system.

4 And you wrote, "Responsibility for  
5 multiple systems raises two problems. First,  
6 it is not clear how a respondent responsible  
7 for multiple systems is supposed to mentally  
8 process and answer a question framed in the  
9 singular. Is she/he supposed to pick the  
10 largest? Pick one at random? Or use the  
11 average?"

12 And then you go on. But that's  
13 basically your point. If you're responsible  
14 for more than one system, you're not sure which  
15 one to focus on, right?

16 A. That's what I said here.

17 Q. Okay. And you asserted that this was  
18 a problem for both the Bortz and Horowitz  
19 surveys, correct?

20 A. Well, counsel, I think I can shortcut  
21 this.

22 Q. Okay.

23 A. All right?

24 Q. You're ready to confess error?

25 (Laughter.)

1 THE WITNESS: No, I'm not. I'm ready  
2 to point out another one of your errors.

3 BY MR. LAANE:

4 Q. Okay.

5 A. Is that this portion of the direct  
6 testimony was written based on the original  
7 Bortz reports. And the Bortz reports were  
8 silent on the issues that I think you're going  
9 to start to ask me about --

10 Q. Okay.

11 A. -- which are clarified in the rebuttal  
12 reports that I read later.

13 So the criticisms that I have levied  
14 in this section --

15 Q. Yes.

16 A. -- I no longer levy.

17 Q. Against Bortz?

18 A. Against Bortz.

19 Q. You still levy them against Horowitz?

20 A. Oh, I don't know. No, I don't levy  
21 them against Horowitz.

22 Q. Well, isn't it the case that in  
23 Horowitz where an individual was responsible  
24 for multiple cable systems, if they had the  
25 same --

1           A.     Oh, that's right.

2           Q.     -- signals, they were only asked to

3     fill out one survey, right?

4           A.     That's right. That's right.

5           Q.     So --

6           A.     And that one survey -- that one survey

7     was applied to all the multiple systems.

8           Q.     Right.

9           A.     Right.

10          Q.     So this ambiguity problem --

11          A.     And I wouldn't have done that either.

12          Q.     Okay.

13          A.     Yeah. So it's a different criticism.

14     I -- you know, I -- I do have a criticism of

15     Horowitz that does not apply to Bortz.

16          Q.     Okay.

17          A.     But it's a different criticism than

18     the one that's written here.

19          Q.     Well, if one person is doing one

20     survey about multiple systems, doesn't the

21     ambiguity issue you've raised at page 25 apply

22     to Horowitz in that situation?

23          A.     Oh, I think it does -- I think -- I'm

24     not sure it's an ambiguity issue, but it is an

25     issue of not collecting appropriate data.



1 Q. Okay. Now, another change -- and you  
2 addressed a little bit -- in the 2010 through  
3 '13 Bortz survey versus the prior version was  
4 the use of a customized survey for systems that  
5 carried WGN as their only distant signal,  
6 right?

7 A. Right.

8 Q. And would you agree for those WGN-only  
9 systems, you know, what you've been calling the  
10 spider web becomes much simpler because we have  
11 just one signal and they're given a written  
12 description of the programming?

13 A. Yes, I would.

14 Q. Okay. And you agree that this  
15 procedure was a positive step, right?

16 A. Yes.

17 Q. Okay. Now, you also said in your  
18 written direct testimony that the Horowitz  
19 survey reminds respondents not to assign value  
20 to programs that are substituted for black-out  
21 programming. But just to be clear, I mean,  
22 that general statement is the instruction they  
23 were given, right?

24 And, Geoff, could you bring up slide  
25 2, please.

1 A. Yeah.

2 Q. Let me just show you. This was the  
3 instruction given in Horowitz, right? "Please  
4 do not assign any value to programs that are  
5 substituted for WGN's blacked-out programming."

6 A. Yes.

7 Q. Okay. But Horowitz didn't do anything  
8 to identify for respondents, you know, which  
9 specific programs were substituted for  
10 blacked-out programming, right?

11 A. I don't recall. I -- I will accept  
12 your representation that that's correct.

13 Q. Okay. You can take that it down,  
14 Geoff.

15 And did you see the testimony from  
16 Allan Singer and from Mr. Trautman, who  
17 explained CSOs outside the Chicago area would  
18 really have no reason to know what programming  
19 had been blacked out on WGNA?

20 A. I don't recall that testimony, but I'm  
21 sure I read it.

22 Q. All right. You don't have any reason  
23 to doubt that testimony, do you?

24 A. No, I don't.

25 Q. Okay. Now, you mentioned in your

1 testimony the Horowitz survey questionnaire  
2 includes repeated references to distant signals  
3 and distant broadcast stations.

4 But would you agree that in the  
5 context of a survey administered to CSO  
6 executives repeatedly referring to distant  
7 signals and distant stations was likely to tip  
8 them off the survey related to copyright  
9 royalties?

10 A. Could you repeat the question?

11 Q. Sure. You're giving a survey to  
12 knowledgeable cable system executives. You  
13 keep referring to distant signals and distant  
14 stations. Isn't that likely to cause at least  
15 some of them to infer this is a survey about  
16 copyright royalties?

17 A. I don't know.

18 Q. Well, do you agree that potential bias  
19 in a survey is minimized by having respondents  
20 blind to the purpose and sponsorship of the  
21 survey?

22 A. I not only agree with it, I have a  
23 feeling I have written that.

24 Q. Okay. Did you look at the rebuttal  
25 testimony of Mr. Allan Singer, who was a cable

1 executive for many years?

2 A. I did.

3 Q. Okay. And did you see Mr. Singer  
4 disagreed with your assertion that the constant  
5 sum question was too difficult for cable system  
6 executives to answer?

7 A. I suspect he did, but if we're going  
8 to talk about it, I'd like to see what he said.

9 Q. For these purposes, I'll represent to  
10 you that that's generally what he said, but  
11 what I want to ask you is this: Would you  
12 agree that Mr. Singer, as somebody who was a  
13 cable system executive for many years, would  
14 know more than you do about the duties and  
15 knowledge of a cable system executive?

16 A. Well, not necessarily in this type of  
17 circumstance. And I refer you back to the  
18 Stanford psychology experiment where the  
19 psychology Ph.D.'s were all using small sample  
20 sizes. People are very -- don't necessarily  
21 have great views of how they make decisions.

22 So maybe he does; maybe he doesn't. I  
23 don't know.

24 Q. Okay. Would you agree that the  
25 constant sum scale is a very popular device in

1 marketing research?

2 A. Yes, I would. Just my view is that  
3 it's inappropriate here.

4 Q. Because of what you call the spider  
5 web?

6 A. Because of -- of -- well, the whole  
7 question is inappropriate for reasons beyond  
8 the spider web, but I think it's inappropriate  
9 because of the spider web and I think it's  
10 inappropriate because of the use on the  
11 telephone.

12 Q. Telephone now. And on the telephone,  
13 you mentioned an article by Axelrod and you're  
14 referring to Joel Axelrod, correct?

15 A. Yes, Journal of Advertising Research  
16 in 1968.

17 Q. And you -- Geoff, could you give me  
18 the ELMO, please.

19 You referred to him a couple times as  
20 Mr. Axelrod. And he's -- he's actually  
21 Dr. Axelrod, right?

22 A. He is Dr. Axelrod according to this.  
23 I referred to him as Mr. because he was not an  
24 academia, and I made an incorrect attribution  
25 using a flawed heuristic.

1 (Laughter.)

2 BY MR. LAANE:

3 Q. Okay. And he was in charge of  
4 advertising research at some pretty big  
5 companies, including Lever Brothers and Xerox,  
6 right?

7 A. Lever Brothers, it says here. Does it  
8 say Xerox here?

9 Q. It says Xerox here (indicating).

10 A. Um-hum.

11 Q. And large corporations invest  
12 significant amounts of money and expertise in  
13 their marketing research, right?

14 A. Sometimes.

15 Q. You expect companies like Lever  
16 Brothers and Xerox probably would?

17 A. Back then, certainly.

18 Q. Okay.

19 A. Now, less so.

20 Q. Did you review Dr. Axelrod's prior  
21 testimony in these proceedings?

22 A. At some point in time, I did.

23 Q. So you know he testified in support of  
24 the Bortz survey, right?

25 A. Yes, I do.

1 Q. And he testified that in the time  
2 since he wrote his 1968 article, he had gained  
3 additional expertise using constant sum surveys  
4 in the business-to-business setting and that he  
5 did now think it was appropriate to do them  
6 over the telephone, correct?

7 A. Oh, okay. He may have said that. I  
8 don't agree with him.

9 Q. Okay. But he said that?

10 A. He said it.

11 Q. All right. And, in fact, he  
12 testified --

13 A. I assume he said it. You're  
14 representing to me he said it. There it is. I  
15 see he said it.

16 Q. And Dr. Axelrod said that he felt, you  
17 know, a constant sum survey like Bortz was  
18 ideally suited to the purpose of determining  
19 the relative value of different types of  
20 programming, didn't he?

21 A. Can we say -- can you point me to that  
22 passage?

23 Q. Geoff, could you bring up Exhibit 1020  
24 at page 11,231, starting at line 5.

25 This is the prior oral testimony of

1 Dr. Axelrod already admitted as Exhibit 1020.

2 JUDGE STRICKLER: And before you get a  
3 question in on that one, the one we just had  
4 up, it showed -- I guess it was Dr. Axelrod  
5 saying "short telephone surveys in business to  
6 business surveys are appropriate."

7 In your understanding, what  
8 constitutes a short telephone survey?

9 THE WITNESS: Well, I guess we're  
10 getting things -- I'm uncomfortable with that  
11 question because what constitutes a short  
12 survey versus a long survey depends on the  
13 difficulty or the complexity of the task.  
14 Right?

15 JUDGE STRICKLER: Let's bring it home  
16 to this particular proceeding. In terms of  
17 duration, did you think that the Horowitz or  
18 the Bortz survey questions, answer for each one  
19 of them, if you would -- was a short telephone  
20 survey or long telephone survey or something  
21 else?

22 THE WITNESS: Well, I think all  
23 telephone surveys are almost by definition  
24 short. Right? And they have to be nowadays.  
25 Otherwise people hang up.



1 I don't know how to answer that  
2 question, Your Honor, because this is a very  
3 complex task that's being asked of the  
4 respondent.

5 JUDGE STRICKLER: Are you aware of how  
6 much time it took for the -- on average, for  
7 the median survey respondent to complete it?

8 THE WITNESS: And I'm sure counsel  
9 will advise me if I'm wrong, but I seem to  
10 recall in one of the Trautman reports it said  
11 somewhere 15 to 20 minutes.

12 JUDGE STRICKLER: Did you think that  
13 was an adequate amount of time for the task at  
14 hand for the -- since it was Trautman -- let's  
15 limit the question to the Bortz survey?

16 THE WITNESS: Right. The answer is  
17 no, because I don't think any amount of time is  
18 -- is adequate for the task that was put in  
19 front of them.

20 JUDGE STRICKLER: Thank you.

21 BY MR. LAANE:

22 Q. You would agree a standard goal of  
23 people designing surveys, including you, is to  
24 try to keep it down to 20 minutes or less,  
25 right?

1           A.     I think that's right.  Okay.

2           Q.     All right.  So, Dr. Axelrod's  
3     testimony, you can see he is asked:  "In your  
4     judgment is it appropriate to use the constant  
5     sum question to determine the relative values  
6     of different types of programming?"  And he  
7     answers:  "Yes, I think it's ideally suited for  
8     that purpose, since it forces people to focus  
9     on relationships, rather than to look at each  
10    decision independently."

11          A.     Well, I couldn't disagree with him  
12    more because forcing them to focus on  
13    relationships forces them into the spider web.  
14    And this was the distinction I made between the  
15    survey submitted by the Canadian Claimants and  
16    the survey submitted -- the Bortz survey, that  
17    the Canadian Claimants survey eases the spider  
18    web.

19                   What Horowitz -- Horowitz --  
20    Dr. Axelrod is saying here I interpret as  
21    saying it's okay to complicate the spider web.

22          Q.     In the Canadian survey, if a system  
23    carried more than one Canadian signal, would  
24    they ask them about all the signals or not all  
25    the signals?

1 A. I don't know. I don't recall.

2 Q. Okay. Now, you referred earlier to  
3 the Manual for Complex Litigation. Are you  
4 familiar with Professor Diamond's chapter on  
5 survey research in the Reference Manual For  
6 Scientific Evidence published by the Federal  
7 Judicial Center?

8 A. I am.

9 Q. Okay. And would you agree that sets  
10 forth a good list of criteria to look at in  
11 evaluating a survey?

12 A. She has a -- there are a good set of  
13 criteria, not necessarily a complete set but a  
14 good set of criteria that are implicit in her  
15 treatise that are useful in evaluating surveys.  
16 She doesn't set forth a list like the FJC's  
17 Manual for Complex Litigation, but she has a  
18 very well written chapter describing some  
19 considerations that are useful in designing and  
20 analyzing surveys.

21 Q. Okay. And would you agree that  
22 Dr. Nancy Mathiowetz is a well-qualified survey  
23 methodologist?

24 A. I have no reason to dispute her  
25 qualifications.

1           Q.     Okay. Now I want to ask you about the  
2 correlation analysis at pages 18 and 19 of your  
3 rebuttal that you were talking about. A little  
4 earlier today we discussed the correlation  
5 between the responses to Question 3, cost, and  
6 Question 4, the constant sum question on  
7 valuation.

8                     And as you told us, your view is those  
9 two questions attempt to elicit the same  
10 information, and so you'd expect a 1.0  
11 correlation, right?

12          A.     That's what I said.

13          Q.     Okay. But if cost and value are not  
14 the same thing, then you wouldn't expect a 1.0  
15 correlation, right?

16          A.     Well, let's be careful, because both  
17 questions -- can we look at both questions?  
18 Because I think the predicate to your question  
19 is flawed.

20          Q.     Well, I understand and you've  
21 testified about your interpretation of the two  
22 questions.

23                     But if they're different questions,  
24 then you wouldn't necessarily expect a  
25 correlation of 1.0 between the answers, right?

1           A.     You wouldn't necessarily if they are  
2     different questions. But one of the questions  
3     asks about cost and one of the questions asks  
4     how much would you have spent.

5           Q.     Well, the question --

6           A.     So they're closely related questions,  
7     if they are different. And I'm not sure what  
8     the difference would be and how either one  
9     would relate to marketplace value.

10          Q.     Does Mr. Horowitz disagree with you  
11     that the questions are asking the same thing?

12          A.     I don't know.

13          Q.     Did you look at Mr. Horowitz's  
14     rebuttal testimony?

15          A.     No, I did not.

16          Q.     If Mr. Horowitz said they're looking  
17     at different things, I take it you would  
18     disagree with him?

19          A.     No, I would want to see what he said  
20     and I would want to read it in context to see  
21     why he thinks they're looking at different  
22     things.

23          Q.     Now, I want to focus in on how you did  
24     your correlation analysis. And just so we can  
25     see how this works, I just want to look at one

1 example of how you built the line in your data.

2 Can I have a copy of Exhibit 1119.

3 You know what, I think I have one. Never mind.

4 I think I should have it here. All right.

5 MR. LAANE: May I approach, Your  
6 Honor?

7 JUDGE BARNETT: You may.

8 BY MR. LAANE:

9 Q. And I'm handing you what has been  
10 marked as Exhibit 1119. This is a Bortz survey  
11 response. It's a little hard to read, but if  
12 you see in the upper right-hand corner, it's  
13 survey number 103. And I just want to use this  
14 as an example of how you built up the data for  
15 your correlation analysis.

16 So, Geoff, could you put up  
17 Exhibit 1115, please.

18 And, Dr. Steckel, this was produced to  
19 us as part of the underlying documents for your  
20 correlation analysis. And you can see at the  
21 end of that rather long file name it says "CRA  
22 work product."

23 And CRA are the ones who actually  
24 crunched the numbers for you, right?

25 A. Charles River Associates.

1 Q. Okay. Known as CRA?

2 A. Yes.

3 Q. Okay. So now, Geoff, if you could go  
4 down to the row for survey number 103, I think  
5 it's actually in row 106 of the spreadsheet.

6 Okay. So, Dr. Steckel, if you can  
7 just look across there, and do these numbers  
8 line up with the ranking for expense and then  
9 the constant sum figures that we are seeing in  
10 this survey response form?

11 A. Yes.

12 Q. Okay. And then, Geoff, if you can  
13 shift the spreadsheet over so we can see the  
14 columns more to the right.

15 What you did here was, since one of  
16 these was a rank order scale and the other one  
17 had relative values, is you converted the  
18 constant sum answers into rankings, right?

19 If you could continue going to the  
20 right there, Geoff.

21 So that, for example, where there was  
22 a tie in relative value, for example,  
23 syndicated, news and -- let's see. You can  
24 see, for example, there was a tie between  
25 syndicated and news here, right?

1 JUDGE FEDER: And news.

2 THE WITNESS: Yes, there were two  
3 ties.

4 BY MR. LAANE:

5 Q. And news, right. And then there was  
6 also a tie between PBS and devotional?

7 A. Yes. What row on the spreadsheet are  
8 we on? Are we on row 106?

9 Q. We're on row 106, which, because a few  
10 rows were taken up for the headings, is survey  
11 103.

12 A. Right.

13 Q. And to make it easier to compare all  
14 these numbers, I just put them on a slide.

15 If you could go to slide 5, please,  
16 Geoff.

17 So we can see here that, for example,  
18 because of the tie, movies, syndicated, and  
19 news all ended up with a rank of 3, right?

20 A. Yes.

21 Q. And then because of the tie between  
22 PBS and devotional, they ended up at tied at  
23 5.5, right?

24 A. Yes.

25 Q. But, mathematically, the only way



1     you're going to get a perfect 1.0 correlation  
2     is if the columns Steckel Q3 rank and Steckel  
3     Q4 rank have exactly the same numbers, right?

4         A.     Yes.

5         Q.     Right. So, I mean, under your  
6     methodology, it guarantees we're not going to  
7     have a 1.0 correlation, right?

8         A.     Well, when there are ties, it  
9     guarantees. If there are no ties, then you  
10    still can have the 1.0 correlation.

11               However, the impact of ties on rank  
12    correlations can be very small. For example, I  
13    did an analysis that showed the impact of a  
14    single tie -- now this is an extreme example,  
15    this is admittedly an extreme example -- but  
16    the impact of a single tie lowers the maximum  
17    correlation from 1.0 to .9856, which is a small  
18    -- a small difference.

19               And that's why I have the other two  
20    columns in the table on page 19 to show that  
21    even if you are going to allow for ties, then  
22    you still have a lot of data that failed the  
23    test.

24         Q.     Well, you say ties are an extreme  
25    situation. But, actually, ties were extremely

1 common, weren't they?

2 A. No, this is -- this is an extreme  
3 situation. I did not say ties are an extreme  
4 situation. I said this particular observation  
5 was cherry-picked because it is an extreme  
6 situation, that there are five of the seven  
7 elements that are tied.

8 How many of the respondents of the  
9 entire 653 plus have five of the seven elements  
10 tied? I'm sure you could count them on one  
11 hand and this may be the only one.

12 Q. Are you aware that, for example, in  
13 2010, ties can be found in 106 of 163 of the  
14 Question 4 response sets?

15 A. Well, but then why can't ties be found  
16 in the rankings too? Can we look at the  
17 original rankings to see if there are ties  
18 there?

19 Q. The rank order question does not allow  
20 for ties.

21 A. What makes you say that? Unless there  
22 was somebody in the room or the interviewer was  
23 telling them don't tie. There's no reason that  
24 you can't have ties given when somebody is  
25 asking you to rank order the seven items.

1 That's preposterous.

2 In fact, if in 653 observations there  
3 are no ties, I would suspect there were some  
4 shenanigans going on with what the interviewer  
5 was doing with respect to those questions. The  
6 interviewer must have been interfering.

7 It's impossible for you not to have  
8 someone out of 653 respondents offer a tie.

9 Q. Are you saying it's not often done in  
10 survey research that people are given a rank  
11 order question and not allowed the option for a  
12 tie?

13 A. Well, I didn't see anything in the  
14 question that said don't tie. So if there are  
15 no ties, if you're representing to me that  
16 there are no ties in the 653 respondents, then  
17 my experience tells me that the interviewer was  
18 forbidding ties.

19 Q. Geoff, could you give me the ELMO  
20 again, please.

21 The chart on your correlation analysis  
22 at page 19, you put in the minimum correlation.  
23 Although you didn't show it in your charts, in  
24 your underlying documents, you also computed  
25 the mean correlation and the stacked

1 correlations of Question 3 versus Question 4,  
2 right?

3 A. Well, I was only concerned with the  
4 mean. For some reason, the Charles River folks  
5 did the stack.

6 Q. But you didn't report the mean in this  
7 table either, did you?

8 A. That's correct, I did not.

9 Q. Okay. And if we look at the mean or  
10 the stack, it's pretty close to .9 in all four  
11 years, isn't it?

12 A. It was around .9 in all four years.  
13 But for it to be .9, that means there had to be  
14 some people who had pretty low correlations.  
15 And there are here. So what this shows is that  
16 at least for these four people that are in this  
17 third column here, that the data have no  
18 construct validly for those four people.

19 And I firmly believe that.

20 Q. If cost and value are related but  
21 different, it wouldn't be surprising to see a  
22 high but non-1.0 correlation, right?

23 A. Well, I mean, if the sun rose in the  
24 west, it might be possible that I would have a  
25 sun tan on a different side of my body too.

1 But, you know, if cost and value are different  
2 things, then that only highlights, as Your  
3 Honor claimed before -- explained before -- not  
4 that -- asked before, the ambiguity in the  
5 language used in the questions.

6 And that -- also that removes  
7 construct validity immediately.

8 Q. If they're related but different, you  
9 wouldn't be surprised to see a high but not  
10 perfect correlation, right?

11 A. Well, I would like to know what they  
12 are, but, you know, we could also do -- the  
13 mean is not what's relevant. What's relevant  
14 is the proportion of the sample that gives you  
15 bad data.

16 And so I would take a look at -- let's  
17 say, I would argue that the fraction that's  
18 below .9 is a more -- is more indicative of the  
19 metric that we want to look at in evaluating  
20 these data than the mean.

21 Q. You talked a little bit about the  
22 Canadian survey. And the Canadian survey was  
23 only designed to look at the value of  
24 programming on Canadian distant signals, right?

25 A. That's my recollection, yes.

1 Q. It wasn't designed to look at the  
2 entire universe of Form 3 systems, right?

3 A. I don't recall, but I'll accept that.

4 Q. Okay. Thank you. I have no further  
5 questions.

6 JUDGE BARNETT: Any other  
7 cross-examination? Hearing none, redirect?

8 MR. OLANIRAN: No redirect, Your  
9 Honor.

10 JUDGE BARNETT: Thank you,  
11 Mr. Olaniran.

12 Professor Steckel, thank you. You may  
13 be excused.

14 THE WITNESS: Thank you.

15 (The witness stood down.)

16 MR. OLANIRAN: Your Honor, Dr. Stec is  
17 our next witness and is kind of MIA at this  
18 minute. So we're in search -- sorry.

19 JUDGE BARNETT: Well, then let's take  
20 our afternoon recess while the search party  
21 goes out.

22 MR. OLANIRAN: I appreciate that.  
23 Thank you.

24 JUDGE BARNETT: 15 minutes.

25 (A recess was taken at 2:21 p.m.,

1 after which the trial resumed at 2:44 p.m.)

2 JUDGE BARNETT: Good afternoon. All  
3 but the witness please be seated. Please raise  
4 your right hand.  
5 Whereupon--

6 JEFFREY A. STEC,  
7 having been first duly sworn, was examined and  
8 testified as follows:

9 JUDGE BARNETT: Please be seated.

10 THE WITNESS: Thank you.

11 MR. OLANIRAN: Your Honor, just  
12 quickly, a housekeeping matter.

13 JUDGE BARNETT: Yes.

14 MR. OLANIRAN: The order of the  
15 witnesses. The next witness would be Mr. Paul  
16 Lindstrom. And by consent of the parties, I  
17 think we're going to start Mr. Lindstrom in the  
18 morning, assuming that we finish with Mr. Stec  
19 today.

20 JUDGE BARNETT: All right.

21 MR. OLANIRAN: If that's okay with  
22 Your Honors.

23 JUDGE BARNETT: Yes. That's when we  
24 normally start is in the morning.

25 JUDGE STRICKLER: Are you saying that

1 we might be done before 4:30? Is that your  
2 point?

3 MR. OLANIRAN: Yes.

4 JUDGE BARNETT: Oh, Dr. Gray, Mr.  
5 Horowitz, and Ms. Hamilton are not on deck, is  
6 what you are saying?

7 MR. OLANIRAN: Well, Mr. Lindstrom is  
8 actually next, but we weren't certain where we  
9 were going to -- when we were going to finish  
10 today. So rather than have him come and hang  
11 out until 4:15, we thought --

12 JUDGE BARNETT: Understood.

13 JUDGE STRICKLER: And if you just keep  
14 clarifying this point, it will all be moot  
15 anyway.

16 (Laughter.)

17 JUDGE BARNETT: But Dr. Gray is on  
18 deck after Mr. Lindstrom?

19 MR. OLANIRAN: That's correct.

20 JUDGE BARNETT: All right. Thank you.  
21 Proceed.

22 DIRECT EXAMINATION

23 BY MR. OLANIRAN:

24 Q. Good afternoon, Dr. Stec. Would you  
25 please state your full name for the record?



1           A.     My name is Jeffrey Alan Stec.

2           Q.     And would you please describe your  
3     educational background?

4           A.     Sure. I have a Bachelor's degree in  
5     psychology and philosophy from Cornell  
6     University.

7                     I also have a Bachelor's degree with a  
8     minor in math. The Bachelor's degree is in  
9     economics with a minor in math from the  
10    University of Illinois at Chicago.

11                    And then I have a Master's degree and  
12    a Ph.D. in economics from the Ohio State  
13    University.

14          Q.     Dr. Stec, would you mind speaking into  
15    the microphone a little bit more?

16          A.     Sure.

17          Q.     Thank you. And who is your employer?

18          A.     I am employed by Berkeley Research  
19    Group.

20          Q.     And what's your position at Berkeley  
21    Research Group?

22          A.     I'm a managing director there. I'm  
23    also a leader of their intellectual property  
24    practice and a co-leader in their economic and  
25    damages community.

1           Q.     And what type of organization is  
2     Berkeley Research Group?

3           A.     Well, Berkeley Research Group is a  
4     large economic consulting firm. We do a lot of  
5     different things.

6                     For example, we provide expert  
7     testimony in litigation proceedings. We also  
8     do different types of investigation work like  
9     forensic accounting investigations.

10                    We do a lot of regulatory work, a lot  
11    of healthcare work. Basically a lot of  
12    economic and management consulting type work.

13                    So, for example, Forbes named Berkeley  
14    Research Group one of the best management  
15    consulting firms for 2017. Berkeley Research  
16    Group has its primary office, its corporate  
17    office in Emeryville, California, and then has  
18    offices around the United States as well as  
19    overseas.

20           Q.     And what type of consulting expertise  
21    do you provide to your clients in the context  
22    of litigation?

23           A.     I have been practicing economic  
24    consulting professionally for approximately 18  
25    years. In that context I have specialized in

1 intellectual property consulting.

2           What that means, essentially, is I  
3 provide testimony in proceedings dealing with  
4 IP, but I also provide consulting services for  
5 the purposes of looking at the value of IP,  
6 strategically how you might want to employ IP,  
7 the various things that you might want to do  
8 with IP in a non-litigation sense as well.

9           Q.     And you conducted some analysis on  
10 behalf of Program Suppliers for this  
11 proceeding; is that correct?

12          A.     Yes, I did.

13          Q.     And what specific expertise did you  
14 use in the analysis that you are providing in  
15 this proceeding?

16          A.     Well, a lot of the work that I have  
17 done over the years in intellectual property  
18 has to do with apportionment and the  
19 application of apportionment methodologies in  
20 the context of IP.

21                 So what that means essentially is from  
22 an economic perspective how you might look at a  
23 component of a piece of intellectual property  
24 and try to value that. From a survey research  
25 perspective, it is also using survey research

1 in that same regard.

2 Q. Okay. And in what types of cases have  
3 you used this type of apportionment  
4 methodology?

5 A. Well, I can use a couple examples. So  
6 in the patent world, for example, there are  
7 products like Smartphones that have many  
8 different components, each of which have  
9 different patents that are associated with it.

10 And you are trying in some of those  
11 instances to value a portion of that Smartphone  
12 related to a feature, per se, and ultimately  
13 figure out what the value is of that component  
14 in a multi-component product. So that's in the  
15 patent space.

16 In the trademark space, I have done  
17 similar work, trying to get at the value of a  
18 trademark or a piece of trade dress, and the  
19 value you would associate with that independent  
20 of the other features or benefits of a  
21 particular product.

22 And then in the copyright world, I  
23 have done quite a bit of work looking at  
24 licenses for copyrighted materials and trying  
25 to figure out the value of the copyright in the

1 context of a larger product.

2 Q. Okay. And was there any part of your  
3 academic studies that provided a useful  
4 background for the analysis that you conducted  
5 in this proceeding?

6 A. Yes. Through the course of my  
7 educational background, I spent a lot of time  
8 with economics, econometrics, and survey  
9 research learning the various information  
10 theories, what have you, practices, for the  
11 purposes of applying those different  
12 disciplines in the context of the valuation of  
13 intellectual property.

14 Q. And have you conducted -- have you  
15 been involved in survey research studies?

16 A. In the context of my graduate work, I  
17 not only earned my Ph.D. in economics, but I  
18 was working at the Center for Survey Research  
19 at the university from which I earned that  
20 Ph.D.

21 And in that context I did multiple  
22 surveys looking at consumers' perceptions,  
23 consumers' actions, how they interact in the  
24 marketplace from a survey research perspective.

25 Q. And beyond graduate schools, have you

1       been involved with any surveys?

2           A.       Yes, I have.   So in graduate school I  
3       did quite a few surveys in those particular  
4       areas.   Since that time I have been involved in  
5       many more surveys, both as a consulting expert,  
6       as well as a testifying expert.

7           Q.       And about how many surveys would you  
8       say in total that you have been involved in one  
9       way or another?

10          A.       I would estimate in graduate school I  
11       probably was involved with 70 to 80 different  
12       surveys over the course of my graduate school  
13       career.   And then since that time, probably at  
14       least 100 more in my professional career.

15          Q.       And what have you done career-wise  
16       since the time you earned your Ph.D. in  
17       economics?

18          A.       Well, coming out of graduate school, I  
19       was very interested in economic consulting.  
20       And I started with a firm called InteCap.   That  
21       was short for Intellectual Capital.

22                   And what they specialized in, they  
23       were a boutique firm that specialized in IP  
24       services.   So basically litigation, valuation,  
25       strategy, the various things that I have

1 already described.

2 In about four years of my tenure  
3 there, after about four years, they were  
4 purchased by a company called Charles River  
5 Associates. I was with Charles River  
6 Associates until very recently, so for  
7 approximately another 13 years after that.

8 And I recently moved, like I said, to  
9 Berkeley Research Group.

10 Q. And what type of information have you  
11 relied upon for your -- for these IP  
12 engagements that you have talked about?

13 A. Well, basically the way I look at the  
14 different analyses that you can do in the  
15 context of intellectual property, there are two  
16 types of data that I have relied upon.

17 There is what is called revealed  
18 preference data. This is data you typically  
19 think of when you are thinking about  
20 transactions, financial transactions,  
21 transactions between, you know, willing buyers  
22 and willing sellers, typically is what is  
23 called revealed preference data.

24 And that data allows you to sort of  
25 see what consumers' preference is, based on the

1 transactions that they have consummated.

2 The other type of data that I have  
3 relied upon for the purposes of various  
4 analyses I have done is what is called stated  
5 preference data. This is the type of data that  
6 you traditionally collect when you do a survey.

7 It is asking consumers or whomever the  
8 survey respondents may be about their  
9 preferences or their actions or whatever you  
10 are interested in, and then having them state  
11 their preferences that way.

12 Q. Okay. And in what context has your  
13 economic and survey research consulting  
14 experience been used?

15 A. It has been used in a number of  
16 different contexts. Basically as an expert, a  
17 testifying expert in the litigation space, but  
18 also, as I have mentioned, I have done quite a  
19 bit of strategy and valuation work outside of  
20 litigation to try and get an understanding of  
21 intellectual property.

22 Q. And have you been qualified as an  
23 expert in economic and survey research in the  
24 area of intellectual property in other  
25 proceedings?



1           A.     Yes, I have.

2           Q.     And in what specific proceedings have  
3 you been qualified as an expert?

4           A.     I've been qualified as a testifying  
5 expert in District Courts, in State Courts, in  
6 front of the International Trade Commission  
7 here in D.C., as well as in various  
8 arbitrations, both from the American  
9 Arbitration Association, as well as the  
10 International Arbitration Association.

11          Q.     And have you given any presentations  
12 or written articles on economic issues that  
13 relate to intellectual property?

14          A.     I have. I have done about 10 to 15  
15 articles and presentations looking at various  
16 types of intellectual property from an economic  
17 standpoint.

18          Q.     And how many presentations or articles  
19 on that, on economic issues?

20          A.     About 10 to 15.

21          Q.     Okay. And have you done similarly  
22 with respect to survey issues as they relate to  
23 IP?

24          A.     Yes. I think I have done about 15 to  
25 20, as best I can recall, presentations and/or

1 articles looking at survey research as it  
2 relates to IP. And that includes publication  
3 of a chapter in the Litigation Services  
4 Handbook on the use of surveys in litigation.

5 Q. All right. Are you a member of any  
6 professional organizations?

7 A. I am. I'm a member of the American  
8 Economic Association, obviously, due to my  
9 economic background.

10 I'm also a member of the Intellectual  
11 Property Owners Association and the Licensing  
12 Executive Society, which are two IP-based trade  
13 organizations.

14 And then I am also a member of the  
15 American Association for Public Opinion  
16 Research, which is a survey research-based  
17 organization. And not only am I a member of  
18 some of these organizations, but I have also  
19 served on various committees.

20 So, for example, in the Intellectual  
21 Property Owners Association, I have been a  
22 member of the Damages and Injunctions  
23 Committee. And for AAPOR, the American  
24 Association for Public Opinion Research, I have  
25 been part of their Litigation Surveys

1 Committee.

2 Q. And have you provided a more detailed  
3 background of your -- a more detailed  
4 information about your background in your  
5 submission in this case?

6 A. Yes, I have, including my full CV.

7 MR. OLANIRAN: Your Honors, we offer  
8 Dr. Stec as an expert witness in economics,  
9 econometrics and survey research.

10 JUDGE BARNETT: Hearing no objection,  
11 Dr. Stec is so qualified.

12 BY MR. OLANIRAN:

13 Q. Dr. Stec, what -- what were you asked  
14 to do in this proceeding?

15 A. I was asked to review some of the  
16 expert opinions put forth by the Joint Sports  
17 Claimants regarding various topics related to  
18 the Bortz survey and some regression analysis  
19 as well.

20 Q. And specifically which JSC expert  
21 reports were you asked to address?

22 A. I was asked to address Dr. Connolly's  
23 endorsement, basically, of the Bortz survey, as  
24 well as Dr. Israel's regression analysis.

25 Q. Were you asked to review any other

1 information?

2 A. I was. After I had filed my initial  
3 or my -- my original expert report, some  
4 additional information had been produced,  
5 unredacted survey information from Mr.  
6 Trautman, related to the Bortz survey that he  
7 conducted.

8 So I was also asked to review that  
9 survey data and address some of the issues  
10 related to it.

11 Q. Okay. And did you prepare a written  
12 report as to your findings?

13 A. Yes, I did.

14 Q. And would you please turn -- you  
15 should have in front of you a black binder with  
16 a green cover.

17 A. Yes, I do.

18 Q. Do you see an exhibit numbered 6016?

19 A. Yes, I have that in front of me.

20 Q. And would you please identify that  
21 document?

22 A. This is my amended rebuttal testimony.  
23 It was originally introduced September 15th of  
24 2017 and then amended February 12th of 2018.

25 Q. And is this the report you provided as

1 to your findings in this proceeding?

2 A. Yes, it is.

3 Q. Were you responsible for the  
4 preparation of this report?

5 A. Yes, I was.

6 Q. And does this report contain more  
7 detailed information about your education and  
8 experience?

9 A. Yes, it does.

10 Q. And do you have any corrections to  
11 this report?

12 A. No, not as I sit here.

13 Q. And do you believe this report should  
14 be true and correct and of your personal  
15 knowledge?

16 A. Yes, I do.

17 Q. Now, in order to complete the task you  
18 were asked to do in this proceeding, what type  
19 of information did you consider?

20 A. Well, as I mentioned, I was asked to  
21 review the opinions of Dr. Connolly and Dr.  
22 Israel. So I reviewed their expert reports as  
23 part of what I reviewed.

24 There were also other experts as part  
25 of this proceeding that touched on some of the

1 issues I was asked to address related to the  
2 Bortz survey in particular, so I reviewed those  
3 expert reports.

4 There was also expert reports from  
5 previous proceedings that touched on some of  
6 the subject matter that I was asked to review,  
7 so I reviewed those.

8 And then there was third-party  
9 information, articles, book chapters, various  
10 other things that were not part of the  
11 proceeding, per se, but that were useful  
12 publications or articles that ultimately I  
13 reviewed as part of this as well.

14 For the purposes of disclosing all of  
15 this information, it's contained in the  
16 footnotes of my report, all of the information  
17 that I reviewed.

18 Q. And did you reach an opinion or  
19 opinions as to the appropriateness of certain  
20 methodologies that are advocated by Joint  
21 Sports Claimant experts?

22 A. Yes, I did.

23 Q. And what are those opinions?

24 A. Well, the first opinion that I came to  
25 was that Dr. Connolly's endorsement of the

1 Bortz survey is flawed for the reason that,  
2 based on my review of the Bortz survey, it is  
3 flawed.

4 The second opinion that I came to was  
5 the -- is the regressions that Dr. Israel  
6 conducted were also flawed.

7 Q. And we will get to the basis for those  
8 opinions, but before we get there, can you give  
9 us a high-level view of the basis for your  
10 opinion that the Bortz survey and Dr. Connolly  
11 relying on it is flawed from an economic  
12 standpoint?

13 A. Sure. There were a couple reasons  
14 that I came to the conclusion that the Bortz  
15 survey was flawed, and then as it follows  
16 Dr. Connolly's endorsement of it was flawed. I  
17 provided a slide to sort of illustrate this.

18 One, the first reason that I believe  
19 the Bortz survey was flawed and, therefore,  
20 Dr. Connolly's opinion of it was flawed, was  
21 due to the fact that survey respondents in that  
22 survey said, these are the sampled CSOs, it was  
23 difficult for me -- in fact, I find it would be  
24 hard to believe that the respondents in those  
25 surveys were understanding the question, the

1 constant sum question that was asked of them in  
2 the Bortz survey.

3 And even if they understood it, there  
4 was some question in my mind whether they had  
5 the proper qualifications, whether they were  
6 qualified to actually give reliable answers to  
7 it. That was the first reason that I had a  
8 problem with the Bortz survey and  
9 Dr. Connolly's endorsement of it.

10 The second reason was related to what  
11 actually I believe the Bortz survey can be said  
12 to represent or what it is trying to estimate  
13 versus what it -- what everybody, I think, is  
14 -- at least under my understanding -- is  
15 interested in with respect to this proceeding.

16 And, that is, the Bortz survey is not  
17 estimating relative market value because it is  
18 not taking into account properly the  
19 marketplace.

20 Q. And with regard to the regression  
21 analysis done by Dr. Israel, can you tell me,  
22 in general, what led you to -- what led to your  
23 opinion that that analysis is flawed?

24 A. Sure. There were two basic reasons  
25 why, I believe, that Dr. Israel's regression



1 analysis is flawed. The first is that he is  
2 using data from a regulated market to infer  
3 relationships from or about an unregulated  
4 market.

5 I don't believe that's appropriate.  
6 And you can't infer what he may be measuring or  
7 trying to measure in a regulated market using  
8 regulated market data to try and say something  
9 about an unregulated market.

10 The second reason that I believe Dr.  
11 Israel's regressions are flawed is because he  
12 is actually specifying a regression, the  
13 royalty payments as a function of the  
14 programming minutes or the programming that's  
15 being aired on a given signal.

16 But in terms of how those royalty  
17 payments are actually determined, that's not  
18 how I understand them to be determined  
19 according to the statute.

20 Therefore, there is a spurious  
21 relationship there that is -- makes the  
22 regression inappropriate.

23 Q. And, Dr. Stec, you stated that the  
24 Bortz survey respondents could not have  
25 understood the question and could not have been

1 qualified to answer the questions with regard  
2 to the relative market value question.

3 And why do you say that?

4 A. Well, based on my review of some of  
5 the materials that I reviewed as part of my  
6 assignment, Ms. Hamilton, Sue Ann Hamilton, who  
7 from what I understand was a programming  
8 director at one time for a CSO, basically  
9 testified that program directors, respondents  
10 at these CSOs who completed the survey, don't  
11 think about the programming categories the way  
12 they have been defined as part of this  
13 proceeding in their ordinary course of  
14 business.

15 So, in other words, they think about  
16 the programming differently than how it has  
17 been defined here.

18 So when you give them a certain  
19 category, for example, and ask them about it,  
20 they may not have, according to Ms. Hamilton,  
21 the same understanding of what's in that  
22 programming category with regards to  
23 programming content as the definition has been  
24 given in these proceedings.

25 Q. Okay. And let's -- why -- could you

1 elaborate on the basis for your opinion that  
2 the respondents -- the respondents could not  
3 have understood or been qualified to answer the  
4 relative market value question?

5 A. Sure. With --

6 MR. MacLEAN: Objection, leading, Your  
7 Honor. The answer is on the slide.

8 JUDGE BARNETT: Sustained.

9 MR. OLANIRAN: Can you take the slide  
10 off, please.

11 BY MR. OLANIRAN:

12 Q. Now would you please answer the  
13 question?

14 A. Sure. So I just mentioned a moment  
15 ago about why I believe that survey respondents  
16 in the Bortz survey may not have an adequate  
17 understanding of what they are being asked.

18 The other point that I was making was  
19 that they may not be qualified to actually  
20 answer the question. And the basis for that  
21 opinion was my understanding that they don't  
22 actually conduct market transactions for the  
23 programming types that are at issue in this  
24 particular case.

25 Basically my understanding is, is what

1 they do in the marketplace is they buy distant  
2 retransmitted signals. They don't buy  
3 programming content per se.

4 Since they don't have that experience  
5 in the marketplace of actually buying the  
6 programming content, that we're trying to value  
7 as part of this proceeding, they don't have the  
8 requisite experience then to answer these  
9 particular questions.

10 Ultimately the implication of these  
11 two pieces of information, one, they don't have  
12 an understanding of the programming categories  
13 and, two, they don't have experience with, you  
14 know, market transactions for these programming  
15 categories, is that when you give them the  
16 survey questions, you're likely to get  
17 unreliable data because they don't bring the  
18 proper knowledge and experience to bear to  
19 answer the questions.

20 Q. Do you have an example of the  
21 difference in how program categories are  
22 thought of in this proceeding versus how they  
23 are thought of in the market?

24 A. Sure. And this is based, again, on  
25 some information that I read from Ms. Hamilton,

1 where in the marketplace, typical program  
2 managers from a CSO may think about sports more  
3 broadly than what it has been defined here.

4 So it is my understanding that for  
5 this proceeding, there is a live team sports,  
6 professional and college team sports category.  
7 But there is other sports that don't fall into  
8 that category that have to do with like NASCAR  
9 racing or swimming or tennis or various things  
10 like that that don't fall into what's been  
11 called the Joint Sports Claimant category.

12 And in that context, then, the  
13 question becomes do these survey respondents  
14 think of sports more broadly, that would  
15 include these other sports as part of this  
16 other category, or don't they?

17 And the -- at least from what I've  
18 seen, it suggests that they may think about it  
19 more broadly than has been defined as part of  
20 this proceeding.

21 JUDGE FEDER: Excuse me, Doctor.

22 Was -- were the survey respondents  
23 asked to value sports or were they asked a more  
24 specific question?

25 THE WITNESS: Well, in the context --

1 it depends what survey you're looking at. So  
2 there is the Bortz survey and there is the  
3 Horowitz survey.

4 JUDGE FEDER: Let's start with the  
5 Bortz survey.

6 THE WITNESS: In the context of the  
7 Bortz survey, they were asked about sports in  
8 general, live college and professional team  
9 sports. I don't have the survey question  
10 memorized.

11 JUDGE FEDER: You say live college and  
12 professional team sports. And it is your  
13 testimony that a professional in the cable  
14 industry doesn't know what that means?

15 THE WITNESS: No, it is my testimony  
16 that they may think of it more broadly than  
17 what it has been defined as as part of these  
18 proceedings.

19 JUDGE FEDER: Would you think that a  
20 professional in the cable industry would  
21 consider NASCAR to be a live professional or  
22 college team sport?

23 THE WITNESS: That's certainly a  
24 possibility. Ms. Hamilton has given testimony  
25 to that. And I do have some analyses that I

1 have done myself that has suggested that they  
2 may think about it more broadly like that as  
3 well.

4 JUDGE FEDER: Okay. And in the  
5 Horowitz survey?

6 THE WITNESS: The Horowitz survey  
7 actually breaks out the sports category into  
8 two what I will call sub-categories. There is  
9 the live professional and college team sports  
10 category, as we have just defined it, and then  
11 ultimately this other sports category that's  
12 meant to capture the NASCAR and the tennis and  
13 the swimming and the various other sports that  
14 aren't part of that live professional and  
15 college team sports category.

16 JUDGE FEDER: And does that help or  
17 hurt in your estimation?

18 THE WITNESS: In my opinion, I think  
19 that helps. I -- I will be presenting some  
20 analyses, I believe, that can show how that  
21 does help, how the breakout leads to different  
22 percentages in terms of these allocations to  
23 the constant sum question.

24 JUDGE FEDER: Okay. Thank you.

25 BY MR. OLANIRAN:

1           Q.     And do you have the -- do you have --  
2     have you observed any evidence that  
3     demonstrates the disconnect between what survey  
4     respondents -- how survey respondents  
5     understand the questions and how the Bortz  
6     questions are posed?

7           A.     Yes, this is the analysis I was just  
8     alluding to a moment ago. I prepared a slide  
9     that basically compares the Horowitz survey  
10    results to the Bortz survey results, breaking  
11    it out by the various categories that they had  
12    in each of the surveys, as well as over the  
13    years the survey was conducted, so from 2010 to  
14    2013.

15                 So if I can draw your attention to the  
16    slide that's up now, you will see for each of  
17    the columns that are there, so for 2010, for  
18    example, I have put the various allocation  
19    percentages from the Horowitz survey and  
20    juxtaposed them to the various percentages that  
21    you see there for that same year for the Bortz  
22    survey.

23                 And so you can compare those  
24    percentages side-by-side for each of the  
25    categories that you see.



1                   Now, one of the takeaways that I have  
2                   from this particular analysis is if you focus  
3                   on the live coverage of professional and  
4                   college team sport category, and the other  
5                   sport programming category, you can see that  
6                   when you compare Horowitz to Bortz, Bortz is  
7                   always -- has a higher percentage there than  
8                   Horowitz for that live coverage of professional  
9                   and college team sports.

10                   How can we understand why, if the  
11                   Horowitz survey is trying to emulate or mimic  
12                   the Bortz survey, would they have these  
13                   different percentages?

14                   Well, if you look at the other sports  
15                   programming category, the category that was  
16                   implemented by Horowitz but not by Bortz, you  
17                   can see at least some of that percentage  
18                   difference that you observed from the live  
19                   coverage being attributed to the other sports  
20                   category.

21                   This to me reflects that at least some  
22                   of the respondents in the Bortz survey were  
23                   likely allocating these percentages across all  
24                   sports as opposed to just the live coverage of  
25                   professional and college teams.

1           Q.     And you give another reason as to why  
2     you didn't think the Bortz survey respondents  
3     understood the questions that have been asked  
4     and why they were not qualified. Could you --  
5     to respond to the questions. Could you  
6     elaborate on that?

7           A.     Sure. This was in the context of  
8     understanding. Do the respondents understand  
9     the different categories that are given to them  
10    as part of the survey.

11                 Now the question becomes: Well, even  
12    assuming they understand these particular  
13    categories and how they are defined for the  
14    purposes of this proceeding, do they actually  
15    have the requisite information? In other  
16    words, are they qualified to be able to answer  
17    these particular questions that are given to  
18    them?

19                 And in the context of some of the  
20    analyses I have done, there is certainly  
21    evidence to suggest they are not qualified  
22    because they don't give consistent answers to  
23    these allocation questions or to the constant  
24    sum question in terms of these allocation  
25    percentages across the different surveys, the

1 Bortz surveys or comparing the Bortz survey to  
2 the Horowitz survey.

3 Q. And you said you did some analysis  
4 that said the responses were inconsistent with  
5 respect to the Bortz survey?

6 A. That's -- yes, that's exactly what I  
7 said.

8 Q. Okay. And are you using consistent as  
9 a term of art or just in the -- as a  
10 layperson's term?

11 A. Well, for a survey researcher, frankly  
12 for a scientist in general, the term  
13 "consistent" has a special connotation or a  
14 special meaning.

15 When you think about doing survey  
16 research, for example, and you think about  
17 doing surveys, if you ask the same or similar  
18 question in repeated surveys to the same  
19 respondents, you would expect or at least hope  
20 that you get the same results time after time.

21 If you do, that's what consistent  
22 means, at least in a survey research sense.  
23 And if you don't, that suggests the answers  
24 that you are seeing are inconsistent.

25 Q. And how did you determine that these

1 surveys, these Bortz survey responses were  
2 inconsistent?

3 A. Well, if you recall, one of the things  
4 that I reviewed as part of my work here was the  
5 unredacted information that was produced by Mr.  
6 Trautman, the Bortz survey itself, for the  
7 years 2010 to 2013.

8 What that information allowed me to do  
9 is look at what CSOs, respondents from CSOs,  
10 said to this constant sum question and how they  
11 did the allocation across these different  
12 categories over the years to determine whether  
13 or not the answers were substantively similar  
14 or not.

15 Q. And do you have a demonstrative  
16 exhibit which demonstrates your analysis -- the  
17 analysis you just discussed?

18 A. Sure, I do. The first thing I would  
19 like to show is basically what is called the  
20 scatter plot. When I think about analyzing  
21 data, the first thing I think about doing is  
22 can we represent things pictorially, because  
23 that's always a good way, at least as a first  
24 step, to think about what might be happening.  
25 And so that's what I have done here.

1           So let me explain what you are looking  
2   at. This is a comparison for CSOs that took  
3   both the 2010 and 2011 Bortz surveys. So these  
4   are the same respondents that we're comparing  
5   from 2010 to 2011. And we're doing it in just  
6   this slide for the sports allocation category.  
7   So, in other words, what the sports category  
8   was as defined by Bortz.

9           So on the X axis you can see sports  
10  2010 is represented there. And those numbers  
11  represent percentages. So that's the  
12  percentage allocation that a given respondent  
13  gave for that survey in that year, for the  
14  sports category.

15          And then on the Y axis, you see sports  
16  2011. And there you see the same percentages,  
17  the same percentage scale. Those represent the  
18  answers that a particular respondent gave for  
19  the 2011 sports category.

20          Now, what the diagonal line represents  
21  there, it is a 45-degree line, and any answers  
22  that fall on that line are answers that were  
23  the same for the sports category for a  
24  particular respondent for the years 2010 versus  
25  2011.

1           And as you can see, most of the dots  
2   that are there -- and there are different size  
3   dots to represent how many respondents actually  
4   fell in that particular data point -- but you  
5   can see most of the responses there fall off  
6   the diagonal line. What is the meaning of that  
7   or the implication of that?

8           The implication is that most of the  
9   respondents who undertook the 2010 and 2011  
10   surveys gave different allocations for the  
11   sports category in those two years.

12        Q.    And this analysis relates only to the  
13   sports category between 2010 and 2011. Did you  
14   also -- did you do this analysis across all  
15   years for all program categories?

16        A.    I did, for 2010 through 2013, across  
17   all of the different programming categories.

18        Q.    And what did you find?

19        A.    Well, as you might imagine, since I  
20   have just shown you one scatter plot that  
21   represents the sports category comparing two  
22   years, and we have four years total and then a  
23   number of different categories, there are a  
24   number of scatter plots that underlie this 40  
25   to 50 scatter plots.

1           Rather than show all of those, I  
2       created a summary slide that basically combines  
3       all of that information into one illustrated  
4       slide.

5       Q.     Thank you for that, by the way. I  
6       don't think we wanted to see that many scatter  
7       plots.

8       A.     I would think we wouldn't finish me  
9       today if we went through 40 or 50 scatter  
10      plots.

11            So what this represents is -- and I  
12      will sort of go through it very slowly because  
13      I think there is a lot of information here  
14      that's worth detailing.

15      Q.     Just to be clear for the record, you  
16      now have another chart titled Summary of  
17      Differences?

18      A.     Yes. This is the Summary of  
19      Differences chart. And, again, it is looking  
20      at the Bortz survey data and comparing what  
21      respondents said across the different time  
22      periods that were done there.

23            So on the X axis you can see I have  
24      broken out the various programming categories  
25      there. So each histogram represents what

1 people said, respondents in the Bortz survey  
2 said, for that particular category in terms of  
3 the percentage allocation.

4 On the Y axis you have the percentage  
5 of respondents that gave that particular  
6 response.

7 And then in the top right corner, you  
8 basically have a legend that allows you to see  
9 what the differences are between what they said  
10 in one year versus the comparator year.

11 So in this context, let's focus simply  
12 on sports since we have been talking about that  
13 quite a bit already.

14 In the sports histogram, which is the  
15 second from the left, you can see the blue bar  
16 represents roughly 20 percent of the  
17 respondents comparing one year to the next said  
18 the same thing in terms of the allocation they  
19 gave to sports, comparing those two years.

20 But most of the respondents, roughly  
21 80 percent of them, said something different.  
22 So they might have said, you know, 30 percent  
23 allocation in year one and a 40 percent  
24 allocation in year two.

25 So where they would fall, essentially,



1 is in one of those other gray bars with the  
2 gray bars, depending on the color of the gray  
3 bar, representing the difference in percentage  
4 points between what they said in year one  
5 versus year two.

6 Now, I have circled a portion of that  
7 histogram, the red circle that you see there,  
8 to represent those respondents that gave at  
9 least a 10 percentage point difference in the  
10 responses that they gave from year one versus  
11 year two comparison in that particular Bortz  
12 survey.

13 So as you can see across all of the  
14 different histograms that we have there  
15 representing the different programming types,  
16 there are actually quite a few respondents who  
17 gave different answers from a comparison of one  
18 year to the next.

19 Q. And do these scatter plots for all of  
20 the programming indicate that the survey  
21 respondents answered the purported relative  
22 market value question inconsistently over time?

23 A. I think it does. And the reason for  
24 that is because, as I mentioned just a moment  
25 ago, if you look at the blue bar in basically

1 the first five product categories -- and I  
2 don't mention Devotional or Canadian  
3 broadcasting, at least because with Canadian  
4 broadcasting it's a fairly small sample size --  
5 but with the other categories you see that  
6 essentially most of the respondents gave a  
7 different answer year-over-year when the  
8 comparison was made for any of these other  
9 allocations.

10 Q. And so slide -- the previous slide was  
11 about one category going from one year to the  
12 next for the sports category. And this, the  
13 slide we're looking at now, is an aggregation  
14 of all categories.

15 Did you do any additional examination  
16 to support the conclusion you are asking us to  
17 reach?

18 A. Yes. As I said, initially what I try  
19 to do when I do an analysis like this is think  
20 about it from a pictorial perspective because  
21 it helps give useful insight and it is always  
22 easier to try and think about things in a  
23 picture as opposed to trying to do analytical  
24 work right away.

25 But I think ultimately what we can

1 bring to the -- or what I can bring to the  
2 table is a little bit more rigor in terms of  
3 just looking at more than the picture and  
4 actually bringing statistics to bear to see if  
5 the differences that we observe here are  
6 substantial.

7 So what I ended up doing was  
8 conducting three different statistical  
9 analyses. One was a correlational analysis.  
10 The other was calculating what's called  
11 R-squared or the coefficient of determination.

12 And then the last one was actually  
13 calculating a statistic called Cronbach's  
14 alpha, which I will explain in a moment.

15 Q. Okay. Did you create a demonstrative  
16 to address the different statistics?

17 A. Yes, I did.

18 Q. Okay. Let's start with, I think you  
19 described it as a correlation analysis?

20 A. Yes.

21 Q. And could you tell us what that is?

22 A. Sure. So before we focus on the  
23 chart, let me sort of explain what a  
24 correlation analysis is.

25 If you think about two variables,

1 whether they're related or unrelated to each  
2 other, correlation helps you to gauge that. So  
3 you might have two variables that are  
4 independent of each other and they would have  
5 no correlation.

6           You might have two variables that are  
7 highly correlated related to each other and  
8 they might have a perfect correlation.

9           So what does that mean in the context  
10 of this proceeding? Well, if respondents gave  
11 the same answer to the survey that was done in  
12 2010 and then the survey that was done in 2011  
13 and that was consistent across all the  
14 respondents, we would observe a correlation of  
15 1, a perfect correlation. They gave the same  
16 answer consistently year-to-year.

17           If you don't have a correlation of 1,  
18 then obviously you have something less than  
19 that. Correlations can range from negative 1  
20 to positive 1. What a zero means under that  
21 scale is that they don't have any relationship  
22 whatsoever. And then correlations fall in  
23 between those numbers.

24           As you can see with this particular  
25 slide, and I will explain what we're looking at

1 before we get into the actual values of the  
2 correlations, what I have done here is compared  
3 on the X axis the different years that were  
4 available as part of the data from this  
5 proceeding.

6 So there is, in the left-most corner  
7 there, the comparison of 2009 versus 2010.  
8 Again, we're talking about the Bortz survey and  
9 respondents that participated in both of those  
10 years on that survey.

11 And then the different colors of the  
12 bars that are represented there, as you can see  
13 the legend at the bottom, represent the  
14 different programming categories that are part  
15 of this proceeding.

16 The height of the bars, as you see  
17 them in the chart, represent the value of the  
18 correlation coefficient.

19 When you compare it, for example,  
20 movies is the first blue bar you see there from  
21 2009 to 2010 and you see a value of  
22 approximately .12. That's the value of that  
23 correlation for that particular programming  
24 category.

25 As I mentioned a moment ago, perfect

1 correlation means that the answers that  
2 respondents gave from, say, 2009 to 2010 were  
3 the same for a given category. As you can see,  
4 if you just simply focus on 2009 versus 2010,  
5 those correlations are all -- well, they  
6 are .5, a little over .5 or below.

7 And if you look across the different  
8 comparisons that are there, 2009 versus 2011  
9 and so on, you can see most of the correlations  
10 are below .5 with many of them being even much  
11 more -- much lower than that.

12 Q. And what do these correlations tell  
13 you about the consistency over time of the  
14 answers given by the same CSOs in the Bortz  
15 survey?

16 A. This analysis gives me the insight  
17 that respondents over time -- again, the same  
18 CSOs over time -- aren't giving the same  
19 answers over the time periods. So, in other  
20 words, they are being inconsistent.

21 Q. You also did an analysis which I think  
22 you referred to as the R-squared. What is  
23 that?

24 A. Well, R-squared is a measure of the  
25 relationship, again, between two variables.

1 Oftentimes it is used in conjunction with a  
2 regression analysis.

3 What it basically measures or  
4 represents is how much of the movement in one  
5 variable can be explained by the movement in  
6 another variable.

7 So it is very useful or very helpful  
8 to indicate, well, just how much of a  
9 relationship or dependency is there from one  
10 variable, comparing one variable to another.

11 Q. And do you have a graphical  
12 representation of your R-squared analysis?

13 A. Yes, I do. The next chart that we're  
14 putting up that is entitled Coefficient of  
15 Determination, or R-Squared, is a very similar  
16 chart to what you saw before in terms of what's  
17 conveyed here, although it is focused instead  
18 on -- instead of on correlation, on the  
19 R-squared.

20 So the setup is the same. You have  
21 these across the X axis different comparisons  
22 year-to-year. The different colors of the bars  
23 represent the programming categories. And then  
24 the height of the bars represent the R-squared.

25 And as you can see from this slide,

1 most of the R-squares are below -- all of the  
2 R-squares are below 50 percent or .5, and most  
3 below 30 percent or .3. What does that mean?

4 That basically means that one variable  
5 has very little explanatory power or not much  
6 explanatory power in the context of explaining  
7 another variable.

8 If I give you the value for what  
9 somebody said an allocate -- or what a  
10 collection of people said an allocation was for  
11 one year, you wouldn't have strong relationship  
12 in terms of saying what the value for that  
13 allocation would be the following year.

14 Q. And the third analysis I think you  
15 mentioned was the Cronbach alpha.

16 A. Yes.

17 Q. What is that analysis?

18 A. Well, in the context of -- and this is  
19 typical in survey research -- you want your  
20 surveys to be internally consistent, which  
21 means that when you ask questions that are  
22 getting at the same uni-dimensional construct,  
23 you want them to be basically giving you  
24 something that's internally consistent.

25 In other words, they are basically



1 getting the same answers with these separate  
2 questions you are asking about this  
3 uni-dimensional construct.

4 So in the context of Cronbach's alpha,  
5 that's a statistic that allows you to measure  
6 whether two questions or more than two  
7 questions are internally consistent.

8 And as part of what's been developed  
9 for this particular statistic, there is  
10 actually a scale that researchers use to say:  
11 Well, given your value of Cronbach's alpha, is  
12 this an acceptable level of internal  
13 consistency?

14 Q. And what did you find when you  
15 performed that statistic?

16 A. Well, I prepared a slide similar to  
17 the ones that you see here in terms of breaking  
18 out the comparisons year-to-year and then by  
19 the different programming categories.

20 What I have also done here, I  
21 mentioned just a moment ago that there is  
22 actually a scale that survey researchers or  
23 researchers in general, who avail themselves of  
24 the use of the Cronbach alpha statistic, use to  
25 determine whether the value of that statistic

1 is something that gives you insight into  
2 whether there is internal consistency or not.

3 And I have basically put that scale as  
4 sort of the backdrop of this slide. And you  
5 will see on the right-most part of the slide  
6 the different categories that are going there,  
7 everything from unacceptable all the way up to  
8 excellent.

9 And you will see that most of the bars  
10 fall under the questionable, poor, and  
11 unacceptable category, with just a couple being  
12 an acceptable or good, meaning that the values  
13 of the Cronbach alpha for these different  
14 programming categories comparing two different  
15 years basically show there is a lack of  
16 internal consistency.

17 Q. And so what's your overall conclusion  
18 with regard to the statistics of the  
19 correlation analysis, the R-squared, and the  
20 Cronbach alpha analysis with respect to the  
21 Bortz survey respondent -- the Bortz survey  
22 respondents' responses to the relative market  
23 value question?

24 A. That those statistical analyses are  
25 basically confirming or validating what was

1 observed with the scatter plots, that we see in  
2 most cases respondents not giving the same  
3 answers and, therefore, being inconsistent in  
4 the answers that they give from comparisons of  
5 one survey to the next.

6 Q. Now, could the lack of consistency be  
7 due to changes in the underlying relative  
8 market value of these different programming  
9 categories?

10 A. So remember what the Bortz survey is  
11 purporting to measure here. There is a  
12 relative market value that underlies what is  
13 being stated in the marketplace in terms of  
14 these surveys.

15 And so the question is, does the  
16 underlying value move, is it variable enough to  
17 suggest that there should be changes in these  
18 percentage allocations over time because the  
19 underlying values are moving over time.

20 I, frankly, have seen no evidence to  
21 suggest that. With that said, it is certainly  
22 possible that that could be happening from time  
23 to time. I wouldn't expect it to be a global  
24 phenomena, but there could be instances where  
25 there might be for a specific CSO some reason

1 for there to be a movement in the underlying  
2 relative market value.

3 Q. I believe Mr. Trautman has testified  
4 that the Bortz survey bottom-line results are  
5 consistent from year-to-year.

6 If the bottom-line results are  
7 consistent, why worry about what the internal  
8 allocations are?

9 A. Well, it is important to understand  
10 that when you're talking about those aggregate  
11 results, they are coming from these underlying  
12 CSOs. Each observation is going into that  
13 aggregate and obviously contributing to  
14 whatever that aggregate value is.

15 What I have observed through these  
16 various analyses is that there appears to be  
17 inconsistencies in the answers that the  
18 respondents are giving. Each of those  
19 inconsistencies then is being built up into  
20 this aggregate, making the aggregate, while it  
21 may not change over time, unreliable  
22 nonetheless.

23 Q. And did you perform any additional  
24 analysis besides just looking at the Bortz  
25 respondents' responses?

1           A.     I did.  So one of the issues that was  
2     just raised was perhaps the underlying relative  
3     market value could change over time for a given  
4     CSO, for whatever reason.  They might have  
5     decided to change the programming that they  
6     have decided to rebroadcast, whatever the case  
7     may be.

8                     So in that context then, something  
9     happens over time, and just simply looking at  
10    the Bortz surveys over time doesn't give us the  
11    ability to control for that.

12                    But we do have data that has been  
13    produced as part of this proceeding that would  
14    help us to understand or at least control for  
15    some time component and changes over time.  And  
16    that's the use of the Horowitz survey in the  
17    context of a comparison to the Bortz survey.

18           Q.     With regard to the Horowitz survey,  
19    the Horowitz survey and the Bortz survey are  
20    not -- don't use -- are slightly different, at  
21    least some would say?

22           A.     It is my understanding that the  
23    Horowitz survey was intended to mimic the Bortz  
24    survey with some exceptions.  And my  
25    understanding of those exceptions were that Mr.

1 Horowitz had determined that there were certain  
2 flaws with the Bortz survey that could be  
3 corrected or at least addressed with his  
4 survey, and that's what he did.

5 Q. And then the Horowitz survey has an  
6 additional category, program category, does it  
7 not?

8 A. Yes, in the context of, I believe, the  
9 sports category, yes.

10 Q. And so in making -- in comparing the  
11 two surveys, did you -- what did you do to make  
12 them comparable?

13 A. Well, as I said, the Horowitz survey,  
14 it was my understanding, was intended to mimic  
15 the Bortz survey. One of the places it didn't  
16 was how it defines the sports category. We  
17 looked at this a little earlier in my  
18 testimony.

19 What the Horowitz survey did was it  
20 broke out this other sports category that was  
21 meant to include the sports that aren't covered  
22 under live professional and college team  
23 sports, and then explicitly address that as a  
24 separate category for the purposes of asking  
25 survey respondents how they would allocate to

1       that category.

2           Q.       And how did you treat this difference  
3       in your comparison?

4           A.       Well, it is my opinion that the  
5       Horowitz way of doing it, in other words,  
6       taking live sports separate from other sports,  
7       those are both subsets of the overall category  
8       that Bortz defined. That was the purpose of  
9       what Horowitz did in terms of breaking it out.

10                So by adding those two categories from  
11       Horowitz, the live team sports category and the  
12       other sports category together, we could get  
13       what I called a combined sports category that  
14       would allow me to compare it then directly to  
15       the Bortz sports category as he defined it.

16           Q.       And do you have an example of a CSO  
17       where you compared the Bortz and Horowitz  
18       surveys?

19           A.       Yes. So one of the larger CSOs is  
20       Charter Communications. And so I prepared a  
21       slide that did a scatter plot for Charter  
22       Communications.

23                Now, this, this scatter plot --

24           Q.       Dr. Stec, may I put you on hold for a  
25       second?

1           A.       Sure.

2                   MR. OLANIRAN:  The underlying  
3       document, Your Honor, for this particular  
4       graphic, I think, was restricted.  And I don't  
5       know if the parties have an objection to  
6       continuing.  I think there are only two people  
7       that I'm aware of, but they are both clients,  
8       if you will.

9                   JUDGE BARNETT:  Well, the issue is how  
10      much detail goes into the record and is made  
11      available to the public.  If it is restricted,  
12      then it is restricted.  If it isn't, then it  
13      can be in the open record.

14                  MR. OLANIRAN:  I think I would say  
15      some of it is restricted, but it's just that  
16      one slide, and we can go in camera until that  
17      is concluded.

18                  But the parties, Mr. David Driscoll  
19      and Andrea Dominchek are both from the Motion  
20      Pictures Association, and they actually are our  
21      clients.

22                  JUDGE BARNETT:  And are privy to this  
23      information by virtue of their positions?

24                  MR. OLANIRAN:  I believe so, yes, Your  
25      Honor.



1 JUDGE BARNETT: Okay. We will mark  
2 this portion of the transcript as restricted  
3 then until you get past this exhibit. And  
4 close the door in an abundance of caution so  
5 that no one wanders in.

6 (Whereupon, the trial proceeded in  
7 confidential session.)

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1 O P E N S E S S I O N

2 BY MR. OLANIRAN:

3 Q. I think I was asking you about, you  
4 were answering the question with regard to the  
5 size of the differences, right?

6 A. Yes.

7 Q. Please go ahead.

8 A. And so this is a slide that basically  
9 looks at all of the CSOs across all of the  
10 different programming categories.

11 So, again, these are matched CSOs.  
12 These are CSOs that did the Bortz survey and  
13 the Horowitz survey in the same year.

14 And as you can see, most of those CSOs  
15 gave different allocation percentages in the  
16 Bortz survey versus the Horowitz survey across  
17 the different programming categories that you  
18 see there.

19 Q. And so do these scatter plots for all  
20 programming indicate, of all the different  
21 programming categories, indicate that survey  
22 respondents answered the purported relative  
23 market value question inconsistently when the  
24 question is asked about the same time period?

25 A. That's correct.

1 Q. And overall, again, what does this  
2 suggest to you?

3 A. Well, this, again, is my first pass at  
4 looking at a comparison of the Horowitz and  
5 Bortz surveys in a pictorial way. I did the  
6 same type of statistical analyses that I did  
7 when we focused simply on the Bortz data for  
8 this Bortz versus Horowitz data as well.

9 Q. And I recall those were the  
10 correlation analysis, the R-squared and the  
11 Cronbach alpha statistics, right?

12 A. That's correct.

13 Q. And let's start with the correlation  
14 analysis. What did you find in that regard?

15 A. Well, if we could put up the slide  
16 that basically summarizes the results of that  
17 analysis.

18 And, again, this is broken out by year  
19 comparing in one year the Bortz survey  
20 allocations versus the Horowitz survey  
21 allocations, and then obviously breaking it out  
22 with the different colored bars there by the  
23 programming categories.

24 And as you can see in this context,  
25 all of the correlations are below .5 with many

1 of them being well below .5.

2 Now, I will refresh your recollection.

3 A perfect correlation in this context means  
4 that a respondent gave the same answer in the  
5 Bortz survey -- or a collection of respondents  
6 gave the same answer in the Bortz survey versus  
7 the Horowitz survey. We're not finding  
8 anything like that here.

9 And that to me is especially relevant  
10 because we are trying to control for time,  
11 we're doing it in the same year, controlling  
12 obviously for respondent, we're matching the  
13 respondents, and then we're looking at the  
14 program categories.

15 So this, I think, addresses the issue  
16 can things be changing over time. They can't  
17 in this context because we're focused on the  
18 same period of time when we do these  
19 comparisons.

20 Q. And with regard to the R-squared  
21 analysis, what did you find?

22 A. The next chart summarizes what I found  
23 there. Remember, the R-squared is a measure of  
24 what the relationship is in terms of explaining  
25 the movement in one variable versus the

1 movement in another variable.

2 So in this context it is the Bortz  
3 versus the Horowitz comparison.

4 And here you can see all of the  
5 R-squares are below .2. So less than  
6 20 percent of what's being -- what the movement  
7 in one variable is being explained by the  
8 other.

9 And, again, that's a relatively low  
10 R-squared. In other words, not a lot -- there  
11 is not a strong relationship between these two  
12 variables.

13 Q. And the last variable was -- the last  
14 statistic was Cronbach's alpha.

15 A. Yes.

16 Q. And what did you find with regard to  
17 the CSO, the Bortz/Horowitz CSO respondents,  
18 what did you find when you performed that  
19 statistic?

20 A. I prepared another chart, if we could  
21 put that up. And, again, the backdrop here is  
22 the different -- is the scale that's been  
23 adopted by researchers to gauge Cronbach alpha  
24 values and whether they imply internal  
25 consistency or not.

1                   And you can see in all of these  
2       comparisons, the bars are in the questionable  
3       category or below, suggesting that across all  
4       of the different programming categories for all  
5       of the different years, there is a question of  
6       internal consistency. This suggests there  
7       isn't.

8       Q.       So, Dr. Stec, you did the Bortz versus  
9       Bortz survey responses. You thought the  
10      responses were inconsistent, correct?

11      A.       Correct.

12      Q.       And then you also performed the Bortz  
13      versus Horowitz CSOs that were common to both  
14      samples and you also concluded that the  
15      responses were, were inconsistent?

16      A.       That's correct.

17      Q.       And the basis, I recall, for that was  
18      because you didn't think the respondents  
19      understood the question and, even if they did,  
20      they weren't qualified to respond, to respond  
21      to the survey. Is that right?

22      A.       That's correct. This suggests that  
23      the respondents, because they are giving  
24      different answers even within the same calendar  
25      year, aren't qualified to come up with these

1 particular answers because they don't think  
2 about these allocations or don't have  
3 experience with these type of allocations in  
4 their ordinary course of business.

5 Q. So if we assume that they did  
6 understand the question and that they were  
7 qualified to respond to the questions, is there  
8 any way to find the Bortz results as evidence  
9 of relative marketplace value?

10 A. So if you ask me to put to the side  
11 the results of these analyses, the comparison  
12 that I did in terms of the Bortz and Horowitz  
13 survey or just the Bortz survey itself, which  
14 suggests there are significant inconsistencies  
15 here, even if that's all put to the side and we  
16 don't address it, there is evidence to suggest  
17 there is a problem here.

18 That, nonetheless, even not  
19 considering what we just went through, would  
20 still not mean the Bortz survey is giving or is  
21 able to give insight into the relative market  
22 value phenomena that we're trying to address  
23 here.

24 Q. And why do you say that?

25 A. Well, there are a couple issues that

1 go beyond just simply looking at the data. And  
2 it has to do with the methodology that's  
3 actually employed by the Bortz survey for the  
4 purposes of coming up with these allocations.

5 One --

6 Q. What do you mean by that? I'm sorry.  
7 Go ahead.

8 A. One particular aspect of it is the  
9 Bortz survey doesn't represent market  
10 equilibrium, doesn't represent market prices in  
11 a market that has -- that is unregulated.

12 Instead, it represents a willingness  
13 to pay measure. That is not the same as market  
14 price or market equilibrium. That's one issue.

15 The other issue is within the context  
16 of the Bortz survey, there is no accounting for  
17 the supply side of the market. So when you  
18 think about a typical market in an economic  
19 sense, you have a demand side, what consumers  
20 might demand of a particular good or service,  
21 but then you also have the supply side.

22 The Bortz survey doesn't address the  
23 supply side at all, but that's an important  
24 part of the market that you need to address to  
25 come up with market prices and relative market



1 value.

2 Q. Let's stick to the market equilibrium  
3 question. What do you mean by that?

4 A. Well, I prepared a slide that  
5 hopefully, again, I like sort of referring to  
6 graphics or pictorials, that hopefully  
7 illustrates what I mean by the market price or  
8 market equilibrium not is what the Bortz survey  
9 is addressing in the context of its  
10 methodology.

11 So if we could put up the next slide,  
12 this is a simple diagram of what most of us  
13 think of, probably most of us encountered if  
14 you took Econ 101 in terms of what market  
15 demand and market supply look like.

16 So the downward sloping blue curve  
17 there is market demand. The upward sloping red  
18 curve there is market supply.

19 Now I have drawn in a few more pieces  
20 of information in this particular chart. Let's  
21 first note what the axes are. So on the Y  
22 axis, that is price. On the X axis, that is  
23 quantity.

24 And where it says market equilibrium,  
25 same place where market supply and market

1 demand intersect, that's the market price. So  
2 if you draw that green horizontal line to the Y  
3 axis, you will see that would represent the  
4 market price here.

5 Now, what is the Bortz survey getting  
6 at? Well, it is a willingness to pay measure  
7 that ultimately is being derived from the  
8 survey.

9 So what is willingness to pay in the  
10 context of this diagram? Well, it is the dark  
11 blue part of the demand curve there where I  
12 have an arrow pointing, willingness to pay.

13 Now, what does that mean in terms of  
14 market price and market equilibrium? Well,  
15 typically respondents -- well, not respondents,  
16 just consumers in the marketplace, are willing  
17 to pay more for a particular product than what  
18 market price says they have to pay.

19 So in those instances, those consumers  
20 are able to capture their consumer surplus  
21 because they would be willing to pay something  
22 higher, but they don't have to because the  
23 market price is lower.

24 Well, what the Bortz survey is  
25 deriving for us in the context of the survey is

1 a willingness to pay measure, not a market  
2 price or a market equilibrium measure. There  
3 is a difference there.

4 And the difference suggests that the  
5 willingness to pay is going to be higher than  
6 the market price.

7 JUDGE STRICKLER: But is the standard  
8 a market price or a relative market value?

9 THE WITNESS: Well, relative market  
10 value is going to be the context of a ratio of  
11 market prices. Right? So ultimately comparing  
12 what a price might be for one program category  
13 versus another programming category.

14 JUDGE STRICKLER: In the context of a  
15 constant sum survey, wouldn't the consumer  
16 surplus be in some sense analogous to the  
17 proportionate value, rather than a price?

18 THE WITNESS: Well, what you're  
19 assuming with the proportion -- so willingness  
20 to pay, if you took relative willingness to  
21 pay, which is what at least was purported to be  
22 derived from the Bortz survey, that relative  
23 willingness to pay is only going to be equal to  
24 the relative market prices in very specialized  
25 circumstances.

1 I can go into it in more detail, but  
2 the bottom line is --

3 JUDGE STRICKLER: In a price  
4 discriminatory situation?

5 THE WITNESS: Well, no, I'm just  
6 simply saying in terms of where you have to be  
7 on a demand curve for each of these categories,  
8 programming categories, you basically have to  
9 be on the demand curve where the elasticity is  
10 going to be the same for each of the program  
11 allocations.

12 And that's a very specialized portion  
13 of the demand curve. It would be -- it would  
14 be, I think, unusual to be on the right part of  
15 the demand curve for each of the program  
16 allocations to get it to work out that way.

17 Moreover, the demand curve is likely  
18 changing, the elasticity is changing where you  
19 are in the demand curve, so you might only be  
20 there for a very brief moment in time before  
21 you move away and then you don't have this  
22 relative allocation being -- or the relative  
23 market price being the same as the relative  
24 willingness to pay.

25 JUDGE STRICKLER: Thank you.

1 BY MR. OLANIRAN:

2 Q. And are there any other problems with  
3 just using a willingness to pay measure derived  
4 from the Bortz survey?

5 A. Yes, there is another issue. And this  
6 is more survey-specific. So this next slide  
7 builds off of what we were just looking at a  
8 moment ago.

9 So let me explain a little bit. You  
10 are familiar with market demand/market supply.  
11 We have already talked a little bit about that  
12 on the previous slide.

13 What survey researchers have found,  
14 what economists have found, when you start to  
15 ask people about what they would be willing to  
16 pay for any good or service, for that matter,  
17 in the context of a survey, you're basically  
18 asking them what their price would be in that  
19 context. But they are not actually acting in  
20 the marketplace and paying that price.

21 So what's -- a phenomena that has been  
22 introduced in this context, recognized in this  
23 context, is hypothetical bias.

24 Consumers oftentimes say they are  
25 willing to pay more for a particular good or

1 service than they actually would if you put  
2 them in the marketplace and actually had them  
3 use their own resources to buy the good or  
4 service.

5 So this happens, I do a number of  
6 different surveys trying to get at willingness  
7 to pay, and one of the things that you try to  
8 control for or account for is what people say  
9 isn't always what they are going to do.

10 And what researchers have found in  
11 this context is oftentimes the willingness to  
12 pay as derived from a survey is going to be  
13 higher than the actual willingness to pay if  
14 you put the respondent or collection of  
15 respondents in the marketplace and told them to  
16 use their own resources to purchase the good or  
17 service.

18 JUDGE FEDER: Excuse me.

19 Dr. Stec, I am having a little  
20 difficulty visualizing how that plays out in a  
21 constant sum survey where the respondents were  
22 asked to apportion percentages.

23 It can't go over 100 percent. So how  
24 does this work?

25 THE WITNESS: So this is what

1 typically happens in those particular contexts.  
2 The respondent will gravitate to one or more  
3 categories that they might be most familiar  
4 with. And in this context, they are likely to  
5 over-report the willingness to pay in those  
6 categories.

7 Now, as you just noted, these things  
8 have to sum to 100 percent. So what that  
9 likely means in some of these, call them  
10 secondary categories, that they are going to  
11 underestimate what those percentages are.

12 So they have overestimated what the  
13 percentages are in the categories they have  
14 focused on. And then because it all has to add  
15 up to 100 in the remainder of the categories,  
16 call them secondary categories, they have  
17 underestimated what those percentages are.

18 The point is that they have not given  
19 reliable information, they have not given  
20 accurate values, because of this hypothetical  
21 bias.

22 JUDGE FEDER: Thank you.

23 BY MR. OLANIRAN:

24 Q. And just a quick follow-up on the  
25 constant sum. If, for example, assume, for

1 example, that in a Bortz interview that the  
2 first go-around when the respondents have  
3 allocated and the total allocation comes to  
4 less than 100 percent, let's say 70 percent,  
5 and the respondent was forced to reallocate so  
6 that they get to 100 percent, what -- how would  
7 you -- how would you respond to -- how would  
8 you characterize an occurrence such as that?

9 A. Well, in those situations obviously  
10 the constraint is what's driving their  
11 allocation behavior. And they originally came  
12 up with whatever values they came up with that  
13 didn't add to 100 percent. Presumably at least  
14 they would say those are the values they  
15 believe are accurate.

16 And so in that context then they are  
17 changing what their answers would be to match  
18 the requirements of having something that adds  
19 up to 100 percent.

20 Q. And back to the graph with respect to  
21 -- would you please describe for the record  
22 exactly what we're looking at as distinguished  
23 from the previous graph?

24 A. Sure. So the only thing I have added  
25 to this graph is what I am calling reported



1 market demand there. That's an additional  
2 demand curve. You can look at the blue market  
3 demand curve as the demand curve for this  
4 marketplace for consumers if they were actually  
5 in the marketplace and I was forcing them to  
6 use their own resources to purchase whatever  
7 they are going to purchase.

8 Now, I want to ask them about what  
9 they would do in this marketplace, so don't put  
10 them in the marketplace, just simply ask them  
11 what they would do.

12 Hypothetical bias or the phenomena of  
13 hypothetical bias suggests that that red demand  
14 curve that's to the right of the blue demand  
15 curve would be the demand curve that would be  
16 estimated in a survey asking them what they  
17 would do as opposed to gauging what they  
18 actually do.

19 Q. And is it your testimony that the  
20 Bortz survey should somehow have accounted for  
21 hypothetical bias?

22 A. My suggestion is that hypothetical  
23 bias is likely present. It is a  
24 well-researched phenomena. But the Bortz  
25 survey does nothing that I can see anyway that

1 tries to control or address it.

2 Q. And what's the implication for not  
3 trying to control or address it?

4 A. That the percentage allocations that  
5 are estimated as part of the Bortz survey are  
6 likely to be unreliable. They are not likely  
7 to be accurate.

8 JUDGE STRICKLER: Would you say, sir,  
9 that what the Bortz survey is measuring, I know  
10 you said willingness to pay, would you say it  
11 is measuring willingness to pay in a regulated  
12 setting where the fees are a function of  
13 something completely different because they are  
14 not buying the individual programs, so that it  
15 is revealing to us willingness to pay relative  
16 amounts in a regulated setting as opposed to  
17 giving us relative market values or prices in  
18 an unregulated hypothetical market?

19 THE WITNESS: I think that's a good  
20 question. The way I would answer it is this:  
21 What do the survey respondents have experience  
22 with? We know that they don't have experience  
23 in an unregulated market because it doesn't  
24 exist.

25 So the experience that they bring to

1     bear in answering these questions is based on a  
2     regulated market.

3                 So my first answer to your question  
4     would be that ultimately if they are able to  
5     answer these questions at all, given the  
6     experience that they have, it has to be based  
7     on experience that they have in a regulated  
8     market.

9                 I understand that the Bortz survey and  
10    the Horowitz survey may be trying to get at  
11    what these percentage allocations would be in  
12    an unregulated market, but then I would turn  
13    to, well, what experience do these respondents  
14    have in a market like that to be able to answer  
15    those questions? And I think the answer is  
16    none.

17                JUDGE STRICKLER: Don't they have some  
18    experience with regard to an unregulated market  
19    with regard to buying other channels or  
20    stations that are not distantly retransmitted  
21    and are subject to an unregulated market?

22                THE WITNESS: My understanding is that  
23    they do. But we're focused here on distant  
24    signals that are retransmitted as part of this  
25    market. And so in that context then, that's

1 the experience they have with these particular  
2 signals and the programming that's associated  
3 with these signals.

4 'JUDGE STRICKLER: Do you think there  
5 is some sort of a barrier that they can't --  
6 that is not permeable, they can't take their  
7 knowledge about how they value programming in  
8 an unregulated market, which they have  
9 experience in, and transfer it over to the  
10 regulated market in the context of answering  
11 Question 4 in the Bortz survey?

12 THE WITNESS: Well, it is my  
13 understanding that the markets are different.  
14 So if it is the unregulated market in which  
15 they can purchase the rights to certain  
16 programming content, whatever the case may be,  
17 it is my understanding they have the ability to  
18 advertise, for example, using that with that  
19 programming. They don't have that ability with  
20 these retransmitted signals.

21 And so that could certainly affect the  
22 value of the different programs or how they  
23 might allocate the value to these different  
24 programs.

25 So that would be certainly one thing I

1 would consider. Another thing I would consider  
2 is I think the overall expenditures in this  
3 particular marketplace are relatively small,  
4 the retransmitted distant signal marketplace.

5 So there is a question of whether or  
6 not, because the marketplace is so small, that  
7 these allocations would be different for that  
8 reason as well.

9 JUDGE STRICKLER: Are you concerned at  
10 all that the allocations would be -- that there  
11 wouldn't be a whole lot of thought process even  
12 going into it in the first place because it is  
13 so small as to be de minimis?

14 THE WITNESS: That's certainly a  
15 concern. And certainly some of what I have  
16 observed with some of these analyses that I  
17 have done comparing the surveys over time,  
18 there certainly seems to be respondent-related  
19 error involved. And that could certainly be an  
20 explanation for it.

21 JUDGE STRICKLER: The de minimis  
22 aspect could explain the variation that you  
23 showed us?

24 THE WITNESS: Yes, I think that's a  
25 possibility.

1 JUDGE STRICKLER: I don't know if it  
2 is going to matter much at all, but on a  
3 technical point with regard to the slide you  
4 have in front of you now, you have a market  
5 supply. But the supply of goods that we're  
6 talking about are copies of programs that have  
7 already been produced.

8 So they don't have any marginal cost  
9 attached to them because they have already been  
10 produced. Any cost they would have would be in  
11 substance an opportunity cost alone, right,  
12 because it doesn't cost any more to make a copy  
13 and transmit a copy. Those costs are  
14 reasonably low, right?

15 THE WITNESS: Well, there is a cost  
16 involved with actually acquiring the rights to  
17 retransmit the program, right?

18 JUDGE STRICKLER: But in this  
19 unregulated market, there is only -- there is  
20 no cost on the supply side. The program's  
21 already been created and done. There is no --  
22 there is no, in a static sense, there is no  
23 supply curve at all.

24 And wouldn't the -- wouldn't the price  
25 be determined on a willingness to pay basis

1 based on everybody's willingness, every  
2 potential transmitter's willingness to pay for  
3 the program?

4 THE WITNESS: Yeah, I am not sure  
5 about that. I agree with you, I think, that  
6 the cost of production would already have been  
7 incurred. I think that's what you are saying.

8 JUDGE STRICKLER: Exactly.

9 THE WITNESS: But with respect to  
10 other costs that might be involved, whether it  
11 be some type of administrative cost because you  
12 have to take into account negotiations, for  
13 example, that might take place between willing  
14 buyers and willing sellers and that has to be  
15 accounted for in some way as a cost, or various  
16 other costs, I think that would probably come  
17 into play at least to some extent.

18 JUDGE STRICKLER: Thank you.

19 BY MR. OLANIRAN:

20 Q. Dr. Stec, you spoke earlier about the  
21 failure to take into account the supply side of  
22 the market. Now, how did the Bortz survey  
23 methodology fail to take into account the  
24 supply side of the hypothetical unregulated  
25 market?

1           A.     Well, the Bortz survey, as far as I  
2     could tell, didn't specify a supply side of the  
3     market at all. So, in other words, what it did  
4     was it took a random sample of CSOs for a given  
5     year and asked them the survey questions that  
6     we're familiar with but then left it at that.

7                     So they addressed the buyer's side of  
8     the market but they never addressed the  
9     seller's side of the market in terms of trying  
10    to determine what a willing seller might do in  
11    the context of licensing or making available  
12    the programming content.

13          Q.     And why is that important?

14          A.     Well, because -- and we can sort of  
15    look at this chart -- if you go back to the  
16    slide before, we can look at this chart and  
17    simply put what the Bortz survey is doing, at  
18    least ostensibly, is trying to trace out what  
19    market demand is.

20                    But it is not saying anything about  
21    market supply. If you don't have the  
22    confluence of both of those curves, you can't  
23    say what market price was for any given  
24    category. And you certainly can't say what  
25    relative value would be across two different



1 categories.

2 So in that context, without  
3 stipulating what market supply might be, you  
4 really can't get at a market price.

5 Q. And in this particular context, what  
6 would a supply side factor be?

7 A. Well, I mean, you could think about a  
8 whole host of supply side factors that have to  
9 do with the inputs into the production process  
10 of creating a good or service.

11 Or with the aspect of maintaining that  
12 good or service and continuing to license it or  
13 making it available to respondents -- or to  
14 CSOs.

15 In that context then, those different  
16 factors would trace out some idea of what  
17 supply would be, what's available for  
18 respondents, for survey respondents, CSOs, to  
19 avail themselves of, and ultimately give you  
20 some indication of what market price would be.

21 Q. Let's turn to your review of Dr.  
22 Israel's regression analysis, in particular.

23 And does Dr. Israel's regression  
24 analysis support the Bortz survey assumption  
25 that it represents -- the Bortz survey's

1 representation as evidence of relative market  
2 value?

3 A. No, I don't believe it does.

4 Q. And why doesn't it?

5 A. Well, there are two primary reasons  
6 why I believe the Israel -- Dr. Israel's  
7 regression does not support the Bortz survey  
8 and can't support the Bortz survey if the Bortz  
9 survey purports to be what it purports to be.

10 And in that context, the two reasons  
11 are, one is that Dr. Israel is relying on  
12 transactions from a regulated marketplace. So,  
13 in other words, these are transactions between  
14 two entities, neither of which is what would be  
15 called a willing buyer or willing seller. So  
16 it is not an unregulated marketplace.

17 And so in that context then, the  
18 seller doesn't have a choice as to what they  
19 can receive for their programming content.  
20 They are regulated to receive whatever the  
21 royalty payment would be, given the terms of  
22 the signal that were transmitted.

23 Q. And Dr. Israel used, as part of his  
24 analysis, programming minutes.

25 A. Yes, I believe he did.

1           Q.     And do you disagree with his use of  
2     that as well?

3           A.     Yes, I do.   So what Dr. Israel did was  
4     he took the royalty payments as a function of a  
5     number of different variables in his regression  
6     analysis; one of those variables being the  
7     amount of programming minutes for a given  
8     programming category.

9                     And in that context, he estimated the  
10    regression based on that to come up with the  
11    coefficients that he did.   In that context, he  
12    is basically saying that the royalty payments  
13    are at least being somewhat determined by the  
14    programming minutes.

15                    But it is my understanding of the  
16    regulatory environment here that the program --  
17    that the royalty payments are not a function of  
18    the programming minutes.   The programming  
19    minutes don't go into the calculation of the  
20    royalty payments.

21                    And instead what goes into it is in a  
22    general sense the distant signal equivalents  
23    that are transmitted, the number of those, as  
24    well as the gross receipts of the CSO that's  
25    doing the retransmitting.

1           In no calculation that I'm aware of  
2   when those royalty payments are being  
3   calculated does programming minutes go into it.  
4   Yet Dr. Israel is assuming, or at least putting  
5   forth that there is some relationship between  
6   the royalty payments and the programming  
7   minutes that doesn't exist in the regulatory  
8   environment.

9       Q.     And I think you implied a few minutes  
10   ago that under the regulatory scheme, that the  
11   participants in the regulatory scheme are  
12   compelled to act in a particular way.

13      A.     Yes. They are -- they are basically  
14   forced by the statute to accept royalty  
15   payments that they might not otherwise accept.

16      Q.     And could you give an example of how  
17   that plays out in the royalty scheme?

18      A.     Sure. Some of the data that I'm aware  
19   of has CSOs, so CSOs have to pay a minimum  
20   royalty regardless of what they choose to  
21   transmit or retransmit.

22           And in some contexts, the CSOs pay  
23   that royalty amount, even though they choose  
24   not to retransmit anything. So they are making  
25   a payment and they are not receiving any good,

1 for lack of a better way of putting it, for  
2 that payment.

3 Or in some cases they make a payment  
4 but they transmit -- retransmit less than what  
5 that payment would entitle them to. You  
6 wouldn't observe those phenomena in an  
7 unregulated market because what they suggest is  
8 you would make a payment and not receive a good  
9 or service for it. And that doesn't make any  
10 sense in an unregulated market, yet that's  
11 exactly what we're seeing in this regulated  
12 market.

13 Q. And how do you view that in the  
14 context of Dr. Israel's regression analysis?

15 A. It suggests, again, relying on the  
16 data that Dr. Israel does from a regulated  
17 market can't give us good insight into what  
18 would happen in an unregulated market.

19 MR. OLANIRAN: Those are all the  
20 questions I have, Your Honor.

21 Thank you, Dr. Stec.

22 THE WITNESS: Thank you.

23 JUDGE BARNETT: Cross-examination?

24 CROSS-EXAMINATION

25 BY MR. ADKINS:

1 Q. Good afternoon, Dr. Stec.

2 A. Good afternoon.

3 Q. My name is Bryan Adkins, and I  
4 represent the Joint Sports Claimants in these  
5 proceedings.

6 So I heard you several times in your  
7 testimony this afternoon reference information  
8 that you received from Ms. Hamilton about the  
9 cable industry.

10 A. I wouldn't call it information. It  
11 was my review of her testimony.

12 Q. Okay. And have you, yourself, ever  
13 worked for a cable system operator?

14 A. To the best of my recollection, no.

15 Q. Okay. And so is your testimony about  
16 what cable executives would understand or how  
17 cable executives would interpret the different  
18 categories in the Bortz survey, that is based  
19 on Ms. Hamilton's testimony?

20 A. I would say it is based in part on her  
21 testimony, but it is also based on what I  
22 observed in some of the analyses that I did  
23 that would, I think, confirm her opinions.

24 Q. Okay. And sort of moving on, I'd like  
25 to discuss your opinion that the Bortz survey

1 results are inconsistent and therefore  
2 unreliable.

3 A. Okay.

4 Q. And, first, I'd like to focus on the  
5 paired comparisons that you did for systems  
6 responding to the Bortz survey in multiple  
7 years.

8 A. Okay.

9 Q. And do you have your testimony there?

10 A. I do.

11 Q. If you could turn to page 30 of your  
12 written testimony. Geoff, if you could pull  
13 that up on the overhead.

14 A. I'm on page 30.

15 Q. Do you see where you say, this is at  
16 the top of page 30, "there should be little  
17 variation between the percentages given by a  
18 CSO in one year's survey when compared to other  
19 years' surveys"?

20 A. That's part of a sentence that starts  
21 on the previous page, but I do see where that  
22 is, yes.

23 Q. And on the previous page you are  
24 saying this is based on the assumption that  
25 there is a true value for the cable system

1 operators of the programming that they are  
2 valuing?

3 A. That's basically what it says, yes.

4 Q. Okay. And then if we can move forward  
5 to page 34 of your written testimony, and do  
6 you see where you say, "these respondent-level  
7 measures should be consistent if the Bortz  
8 constant sum question is a reliable way to  
9 estimate the true value of each allocation  
10 percentage for each programming type at each  
11 CSO"?

12 A. Yes, I see that.

13 Q. And with respect to the concept of  
14 reliable that you use there, I'd like to go  
15 back to page 28 in your testimony.

16 A. Okay, I'm there.

17 Q. And here at the top of page 28 you  
18 say, "reliability of survey questions is often  
19 understood and measured to be consistent  
20 results over repeated observations under  
21 similar conditions."

22 A. I see that.

23 Q. And so in the year-to-year paired  
24 comparisons that you did of the Bortz survey  
25 responses, you were just comparing the



1 percentages the system assigned to each program  
2 category in the different years?

3 A. I would probably state it a little  
4 differently. I was comparing the percentage  
5 from a given CSO that was matched for multiple  
6 years. And I did that for all of the CSOs that  
7 were matched.

8 Q. Okay. So the year-to-year comparisons  
9 that you did for Bortz didn't control for other  
10 factors, for example, such as whether the  
11 systems actually carried the same distant  
12 signals in one year to the next?

13 A. That might have been implicit in the  
14 calculation but it wasn't explicit. So, in  
15 other words, I didn't create a model that  
16 explicitly looked at the signals themselves.

17 Q. Right. And the analysis you  
18 presented, the paired comparisons, you weren't  
19 changing it based on whether the Bortz  
20 respondent had the same distant signals in one  
21 year to the next, right?

22 A. I was -- I'm not sure what you mean by  
23 changing it.

24 Q. So the paired comparisons that you are  
25 presenting themselves aren't -- you didn't

1 divide up the data, for instance, according to  
2 whether this set of respondents had the same  
3 distant signals and look at those compared --  
4 those paired comparisons separately from other  
5 systems?

6 A. To the best of my recollection, no.

7 Q. Okay. And so now I'd like to ask you  
8 about some of the conditions that might change  
9 at a cable system from year to year.

10 A. Okay.

11 Q. And would you agree that if a cable  
12 system carries different distant signals in one  
13 year versus another, that could affect how the  
14 cable system values the program categories on  
15 the distant signals it's carrying?

16 A. That's a possibility, assuming that  
17 the programming content has changed in some  
18 way.

19 Q. Sure. And even if the distant signals  
20 are the same from one year to the next, the mix  
21 of programming content on those signals could  
22 change?

23 A. That's possible. I mean, ultimately  
24 it is my understanding that cable systems try  
25 to retain and attract customers. And part of

1     what does especially the retaining part of it  
2     is keeping a consistent programming mix, such  
3     that respondents are going -- or respondents --  
4     customers aren't going to be alienated by  
5     changes that basically change what they are  
6     viewing.

7         Q.     Sure. And in addition to the actual  
8     distant signals changing from year to year, it  
9     is also possible that the local broadcast  
10    signals that the cable system carries could  
11    change from year to year?

12        A.     So these are broadcast signals that  
13    aren't being retransmitted, they are not  
14    distant signals is what you are saying?

15        Q.     Right.

16        A.     That's possible they could change.

17        Q.     And, for instance, if a cable system  
18    adds a local broadcast signal that has the same  
19    or similar content to what's carried on its  
20    distant signals, that could affect how the  
21    cable system might value the programming on  
22    those distant signals?

23        A.     It's possible.

24        Q.     And would you also agree that a change  
25    in the size of the territory that a cable

1 system serves could affect how it values  
2 different categories of programming?

3 A. That could be a consideration as well,  
4 sure.

5 Q. So, for instance, a cable system could  
6 have a significantly larger subscriber base  
7 from one year to the next?

8 A. That's possible. I wouldn't suggest  
9 -- I wouldn't think that would be a global  
10 phenomena. It might happen with one CSO or  
11 something like that. Certainly not something I  
12 would expect to see globally.

13 Q. When you say it might happen with one  
14 CSO, you aren't saying that it only happened  
15 with one CSO?

16 A. I'm not saying that it happened at  
17 all. I'm just simply suggesting that it seems  
18 implausible to suggest that the CSOs are going  
19 to change, all of them are going to change the  
20 number of subscribers they have in a  
21 substantial way from one year to the next.

22 Q. But you don't know one way or the  
23 other how many changed in one year to the next?

24 A. In terms of the number of subscribers?

25 Q. Right.

1           A.     I don't as I sit here, no.

2           Q.     Okay. And so if the number of  
3 subscribers are changing, that could affect the  
4 demographics of the subscriber base?

5           A.     It is possible it could. It is also  
6 possible that it may not.

7           Q.     And what about internal management  
8 changes, for instance, from one year to the  
9 next, if a cable system undergoes a management  
10 change, could that affect how the cable system  
11 might approach valuing categories of  
12 programming on its distant signals?

13          A.     It is possible that could reflect a  
14 change, but, again, it is also possible it may  
15 not, if they want to keep consistent  
16 programming to keep -- retain subscribers.

17          Q.     Okay. So now I would like to look at  
18 a specific example of a paired comparison from  
19 your scatter plots. And, Geoff, if you could  
20 pull up slide 1.

21                 So this graph is taken from  
22 Exhibit V-3 of your rebuttal testimony. And  
23 here I just highlighted one observation as a  
24 point of reference.

25          A.     Okay.

1           Q.     And you gave us sort of an overview of  
2     what these types of scatter plots in your  
3     testimony sort of reflect, and the different  
4     numbers that are represented here, but just  
5     sort of as a quick refresh, so the observations  
6     here are showing a cable system, a cable  
7     system's response in, in this instance, 2011  
8     compared to 2012 for the sports category?

9           A.     Yes, from the Bortz surveys, correct.

10          Q.     And I see here the dots, for lack of a  
11     better word, different sizes. Does that mean  
12     that some of the dots represent different  
13     numbers of cable systems?

14          A.     Different numbers of respondents and  
15     the respondents coming from CSOs, yes.

16          Q.     And, again, the 45-degree line here,  
17     this shows systems that gave the exact same  
18     valuation to sports in 2011 and 2012?

19          A.     That's correct.

20          Q.     And in order to fall on this line, a  
21     system has -- a system has to have exactly the  
22     same response in both years?

23                   JUDGE BARNETT: Mr. Adkins, I'm sorry.  
24     This slide says it is restricted.

25                   MR. ADKINS: Yes, Your Honor. So at

1     this point this is not -- this slide doesn't  
2     contain any system-specific information, but  
3     thank you for reminding me. We will very  
4     quickly be moving into some restricted  
5     system-specific information.

6             JUDGE BARNETT: Thank you. This  
7     points out the need to specify when a document  
8     is filed as restricted exactly what parts of it  
9     are restricted rather than a global  
10    restriction. Go ahead.

11            MR. ADKINS: Thank you, Your Honor.

12    BY MR. ADKINS:

13        Q.     Just quickly circling back, do the  
14     wider circles on the graph show -- does that  
15     mean there are more systems, so a larger circle  
16     reflects a greater number of respondents than a  
17     smaller circle?

18        A.     Yes. And the way I would try to  
19     explain that is the smallest circles represent  
20     one system, one respondent. The next largest  
21     circles would represent two. And then the next  
22     largest three and so on.

23        Q.     Okay. And so looking at the  
24     highlighted circle here that is one respondent?

25        A.     Yes, I believe that is one respondent.

1 Q. And what this shows for this one  
2 respondent is in 2011, the respondent allocated  
3 45 percent to sports?

4 A. Yes, I believe that's right.

5 Q. And then in 2012, that same respondent  
6 allocated 30 percent to sports?

7 A. Yes, that appears to be accurate.

8 Q. So a 15-point drop from one year to  
9 the next?

10 A. A 15 percentage point drop, yes.

11 Q. 15 percentage point drop. Okay.

12 Now I would like to look at the  
13 particular system reflected by this dot. And,  
14 Geoff, could you pull up slide 2.

15 JUDGE BARNETT: And this is  
16 restricted?

17 MR. ADKINS: I apologize. Yes, we're  
18 now getting into restricted information.

19 JUDGE BARNETT: Anyone in the hearing  
20 room who is not privy to restricted  
21 confidential information, please wait outside  
22 until we are finished with this part of the  
23 examination.

24 (Whereupon, the trial proceeded in  
25 confidential session.)



1 O P E N S E S S I O N

2 BY MR. ADKINS:

3 Q. So as between the Bortz survey and the  
4 Horowitz survey, there were significant  
5 methodological differences between the two  
6 surveys?

7 A. I'm not sure I agree with that.

8 Q. You don't agree that the -- any of the  
9 methodological differences between the two  
10 surveys were significant?

11 A. No. I think what I said, at least in  
12 my initial testimony, was that the Horowitz  
13 survey attempted to mimic the Bortz survey. I  
14 think that's what Mr. Horowitz himself said,  
15 except for a few changes, some of which, I  
16 think both of which we went over in my  
17 testimony. That's how I would characterize the  
18 difference in the surveys.

19 Q. Okay. And I guess I would like to ask  
20 you a little more about that.

21 Geoff, could you pull up page 27 of  
22 Dr. Stec's testimony.

23 So if we look at the paragraph here at  
24 the top of the page, here you are discussing  
25 the Horowitz survey's use of descriptions and

1 examples. And the last sentence here, "this  
2 difference demonstrates the descriptions and  
3 examples included in the survey had a direct  
4 and significant effect on the results of the  
5 survey."

6 So at least with respect to the  
7 Horowitz survey's use of examples, you would  
8 agree that that was a significant difference  
9 between the two surveys?

10 A. Well, this is in the context of the  
11 sports category that I went through in my  
12 direct testimony. And there it was clear with  
13 the addition of this "other sports" category  
14 that there was an effect. That was part of  
15 what I testified to.

16 So that's what this is in reference  
17 to.

18 Q. Okay. Is this a yes?

19 A. Well, you seem to suggest that there  
20 would be a difference here that wasn't  
21 accounted for in my comparison. If you recall  
22 from my direct testimony, I combined the "other  
23 sports" category and the "live sports" category  
24 into a combined sports category for the  
25 purposes of comparing Horowitz versus Bortz.

1           Q.     And just so I'm clear in doing that,  
2     your assumption in comparing the Bortz "live  
3     team" sports category to the Horowitz "other  
4     sports" and as you called it play-by-play  
5     sports, was that in Bortz, respondents would be  
6     lumping the "other sports" into the "live team  
7     sports" category?

8           A.     That appears to be the case.

9           Q.     So that's an assumption that if we  
10    didn't make that, then we wouldn't expect, for  
11    instance, in the year-over-year sports  
12    comparison we did, live team sports in Bortz to  
13    combine sports in Horowitz, we wouldn't expect  
14    those to be necessarily the same?

15          A.     I'm not sure I followed your question.

16          Q.     Sorry. I will rephrase.

17                 So if the Bortz respondents weren't  
18    actually lumping "other sports" into the "live  
19    team sports" category, for instance, NASCAR,  
20    they weren't considering that part of live team  
21    sports, they were considering it syndicated,  
22    then we wouldn't expect the exact same  
23    valuation between Bortz's sports category and  
24    the Horowitz other sports plus live team  
25    sports?

1 MR. OLANIRAN: Objection, Your Honor,  
2 this is vague and ambiguous.

3 BY MR. ADKINS:

4 Q. Did you understand what I was going to  
5 say?

6 A. I was going to restate your question  
7 to make sure I understood it.

8 Q. Please do.

9 A. So what you are suggesting is the  
10 Bortz survey respondents were misunderstanding  
11 what Bortz was referring to when he described  
12 the live team sports and they were lumping in,  
13 I guess, part of the programming into another  
14 category outside of the live team sports?

15 Q. No. I was just asking was that your  
16 assumption in comparing live team sports in  
17 Bortz to a combined "live team sports" and  
18 "other sports" category in Horowitz?

19 A. No, I think the way I -- the way I  
20 said it in my direct testimony, the way I would  
21 say it again is that in my opinion, the subset  
22 "other sports" and the subset "live team  
23 sports" as defined by Horowitz, can be combined  
24 together to be compared then to the Bortz  
25 definition of sports, live sports and then

1 ultimately compared on that basis.

2 Q. Okay. So I guess just to be clear  
3 then, you assumed the Bortz respondents were  
4 assigning non-team sports value to the live  
5 team sports category?

6 A. I was assuming that they were making  
7 the "live team sports" category more broad than  
8 the proceedings has defined it.

9 Q. And if they weren't making it more  
10 broad, then we wouldn't expect Bortz "live team  
11 sports" to correlate with the combined  
12 category?

13 A. It is still -- well, I'm not sure what  
14 you mean by correlate. It could still  
15 correlate with the category. I'm not sure.

16 Q. You wouldn't expect the exact same  
17 valuation?

18 A. Potentially not, no.

19 Q. Okay. So we just talked about use of  
20 examples in Horowitz as one methodological  
21 difference. And there were others, "other  
22 sports" as we have just discussed.

23 And there was also a methodological  
24 difference in the way that respondents were  
25 asked about programming for WGN-only systems.

1 Right?

2 A. Which survey are we talking about?

3 Q. So Bortz provided WGN-only respondents  
4 with a list of the compensable programming on  
5 WGN and Horowitz did not?

6 A. I don't recall that specifically, but  
7 if you are saying that's what happened, I'm  
8 willing to accept that.

9 Q. Okay. So considering these  
10 methodological differences, I'm going to ask  
11 you to assume for the sake of argument that the  
12 methodological differences in the Horowitz  
13 survey biased the questions in that survey.

14 Assuming that, I am just asking you to  
15 assume it.

16 A. Can we be more specific about what you  
17 mean by "methodological differences"?

18 Q. Well, the differences that we just  
19 described.

20 A. So this is with respect to sports, the  
21 categorization of sports?

22 Q. We can focus just on sports.

23 A. Okay.

24 Q. Assuming that the Horowitz survey's  
25 questions were biased, then we wouldn't or

1 shouldn't expect cable operators to give the  
2 same valuation to the sports category in Bortz  
3 as they give to the sports category in  
4 Horowitz?

5 A. I think it depends on the magnitude of  
6 the bias and the rationale, the reason the bias  
7 is occurring. So it is possible that could be  
8 the case. It is also possible, at least I can  
9 conceive of ways that it wouldn't be the case.

10 Q. And I would like to -- I was confused  
11 by something that you -- that was presented in  
12 one of the demonstratives comparing Bortz and  
13 Horowitz responses across a number of  
14 categories. And I would just like your help in  
15 understanding what you were comparing.

16 A. Okay.

17 Q. If you could turn to Exhibit -- this  
18 is 4.4 in your testimony. And, Geoff, if you  
19 could pull up the ELMO, I can put it up.

20 And I thank you for reminder. This is  
21 -- we're back in restricted territory.

22 JUDGE BARNETT: It appears our  
23 visitors left anyway, but if you would close  
24 the door.

25 (Whereupon, the trial proceeded in

1 confidential session.)  
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1 C O N T E N T S

2 WITNESS: DIRECT CROSS REDIRECT VOIR DIRE

3 DANIEL HARTMAN

4 By Mr. Cantor 3169

5 By Ms. Plovnick 3177

6 By Mr. MacLean 3235

7 JOEL H. STECKEL

8 By Mr. Olaniran 3254

9 By Mr. Laane 3334

10 JEFFREY A. STEC

11 By Mr. Olaniran 3373

12 By Mr. Adkins 3454

13 CONFIDENTIAL SESSIONS: 3204:21-23, 3245:25-3246:20,

14 3246:23-3247:17, 3423-3426, 3466-3473, 3482-3486

15 AFTERNOON SESSION: 3305

16 E X H I B I T S

17 EXHIBIT NO: MARKED/RECEIVED REJECTED

18 1120 3468

19 1121 3468

20 1122 3468

21 1123 3468

22 6041 3185

23 6042 3185

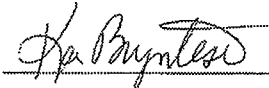
24 6043 3185

25 6044 3185

## CERTIFICATE

I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

3/13/18



Date

Signature of the Court Reporter

## Revised and Corrected Transcript

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